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IN THE

Supreme Court of the United States

October Term, 1965

NO. 3131

E. F. HAMMONS, *Petitioner*

v.

TEXAS AND NEW ORLEANS RAILROAD COMPANY, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals,
Twelfth Supreme Judicial District Court of Texas
Sitting at Tyler

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v.

TEXAS AND NEW ORLEANS RAILROAD COMPANY, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals,
Twelfth Supreme Judicial District Court of Texas
Sitting at Tyler

To: The Honorable, The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Petitioner respectfully petitions this Honorable Court to grant the Writ of Certiorari to the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, at Tyler, in the above case. In this behalf, Petitioner shows unto the Court:

OPINION OF THE COURT BELOW

The opinion of the Court of Civil Appeals for the Twelfth Judicial District at Tyler was handed down July 16, 1964, and appears in 382 S.W.2d 155, styled *E. F. Hammon(s) v. Texas and New Orleans Railroad Company.* There is no opinion of the Supreme Court of Texas, but it refused, no reversible error, Petitioner's Application for Writ of Error on March 17, 1965, and overruled Petitioner's Motion for Rehearing on April 7, 1965.

The opinion is found at Appendix "A". The judgment affirming the judgment of the trial court, and the judgment of the trial court, which was a "take nothing" judgment, are found at Appendixes "B" and "G" respectively. The judgment of the District Court (trial court), setting out therein the special issues submitted to the jury, is found in the record designated as Transcript (Tr. 21-24).

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Honorable Court is based upon the Acts of Congress of June 25, 1958, c.646, 62 Stat. 929, Title 28, U.S.Code, Sec. 1257(3), providing that this Court may, by Writ of Certiorari, review any final judgment or decree rendered by the highest Court of the State in which a decision could be had, where any title, right, or privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

This State court suit was brought under the FELA to recover damages for personal injuries sustained by Peti-

tioner under the clause of Section 1 of the FELA, 45 U.S. Code, Sec. 51, which imposes liability on the employer, "by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, tracks, roadbeds, works, boats, wharves, or other equipment".

The opinion and judgment of the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, at Tyler, sought to be reviewed herein, was entered on July 16, 1964, set out in Appendixes "A" and "B", represents the highest State Court when the Texas Supreme Court refused, no reversible error, to entertain jurisdiction on March 17, 1965, and overruled Petitioner's Motion for Rehearing on April 7, 1965, set out in Appendixes "E" and "F", respectively.

Petitioner invokes the jurisdiction of this Court under Supreme Court Rule 19(1)(a). The State court has decided a federal question of substance in this FELA case not heretofore determined by this Court, and has decided it in a way that it is not in accord with applicable decisions of this Court.

The State court erroneously construed the decision of this Honorable Court in *Deen v. Hickman*, 358 U.S. 57, 79 S.Ct. 1, 3 L.Ed.2d 28, as precluding the Court from reexamining the record to determine whether the adverse findings[1] of the jury the special issues submitted to it

[1] In response to Sp. Iss. No. 1, the jury answered, "We do not" to an issue inquiring whether Respondent failed to maintain the track in question in such manner as would have been done by a reasonably prudent railroad company in the exercise of ordinary care under the same or similar circumstances. In response to Sp. Iss. No. 3, the jury found the occurrence (an engine derailment and a broken rail) **was the result of an unavoidable accident.** Appendix G.

violated Petitioner's rights accorded to him under the Seventh Amendment to the United States Constitution, and thus deprived Petitioner of a fair trial. The Court of Civil Appeals reached the result of an affirmance of the judgment of the trial court by reviewing the evidence from the standpoint of Respondent and gave probative force and weight to evidence that, in law, was incompetent, and ignored evidence which, in law, should have been given probative force and weight. The consequences are the jury rendered a speculative verdict and rendered an *unjust verdict* from which Petitioner has had no protection from an appellate review to which Petitioner was and is entitled.[2]

This Court held in *Jesionowski v. Boston & Main R.R. Co.*, (1946), 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 416, the fact of derailment called upon defendant railroad to make an explanation (negligent conduct in connection with the signal or switch). It was there considered the accident was the result of negligence. In the case at bar, the jury found the occurrence (derailment and broken rail) was the result of an unavoidable accident. This is an affirmative defense under local rules of practice and procedure, which a defendant must plead, but the burden of proof is upon an injured plaintiff to prove and secure a jury finding the event "was not the result of an unavoid-

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[2] New York Times Company v. Sullivan, 376 U.S. 254, at 287, 84 S.Ct. 710, at 729, 11 L.Ed.2d 686, 95 ALR 2d 1412, mot. den'd, 376 U.S. 967; Dick v. New York Life Ins. Co., (1959), 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935; Galloway v. United States, 1943), 319 U.S. 372, 63 S.Ct. 1070, 87 L.Ed. 504, reh. den'd, 320 U.S. 214, 63 S.Ct. 1143, 87 L.Ed. 851; Pleasant v. Fant, 89 U.S. 116, 22 Wall. 116, 22 L.Ed. 780.

able accident".[3] If a jury finds negligence on the part of a defendant and also finds the event was "an unavoidable accident", there is an irreconcilable conflict with the jury's finding on primary negligence and the jury finding the event was the result of an unavoidable accident.[4] It has been judicially recognized the problems arising on the question of unavoidable accident has been a source of much confusion to the courts and juries.[5] It has been determined, however, that if the evidence does not raise the issue that something other than negligence of one of the parties caused the injuries, then the evidence does not raise the issue of unavoidable accident.[6] The purpose to be served in submitting unavoidable accident is to call the matter to the attention of the jury so that it will not be overlooked and the jury will understand that they do not necessarily have to find that one of the parties was to blame for the occurrence complained of.[7] Petitioner contended in the Court of Civil Appeals the issue of "unavoidable accident", as Petitioner had contended in the trial court, there was no evidence to raise the issue,[8] but the Court of Civil

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[3] Rosenthal Dry Goods Co. v. Hillebrandt, Tex. Com. App. 7 S.W.2d 521; Hicks v. Brown, (1941), 136 Tex. 366, 151 S.W.2d 790, 793.

[4] Blanton v. E. & L. Transport Co., 146 Tex. 377, 207 S.W.2d 368.

[5] Texas Power & Light Co. v. Jezek, (Tex. Civ. App. 1957, ref. n.r.e.) 302 S.W.2d 196; Good v. Born, (Tex. Civ. App.—ref. n.r.e.) 197 S.W.2d 589, 591; Cf. Dallas Railway & Terminal Co. v. Bailey, (1952), 151 Tex. 359, 250 S.W.2d 379, 383, and on Mot. for Reh. at 250 S.W.2d, p. 385.

[6] Dallas Railway & Terminal Co. v. Bailey, (1952), 151 Tex. 359, 250 S.W.2d 379 at pp. 383,385, (No evidence to raise issue).

[7] Wheeler v. Glazer, (1941), 137 Tex. 341, 153 S.W.2d 449.

[8] Compare with holding in Strauss v. LaMark, (Tex. Sup. Ct. 1963), 366 S.W.2d 555, that there was "no evidence" raising issue

Appeals refused to rule on this contention or the contention that, under the Federal law, the duty of Respondent in the maintenance of its track and roadbed was prescribed under 45 U.S.C.A. Sec. 51. Moreover, that court did not rule on Petitioner's contention that the inferential rebuttal issue of "unavoidable accident", as known to the Texas practice, could not be used as a tool to defeat the remedy of an injured railroad employee which had been provided for under the provisions of the FELA, and as the same had been interpreted by this Court.[9] Without expressing an opinion of whether the defense of unavoidable accident is available in FELA and Jones Act cases, the Houston Court of Civil Appeals of Texas reached the conclusion the trial court properly *refused* the issue of unavoidable accident in a Jones Act case predicated upon negligence because there was *no evidence* raising such issue.[10]

Despite the judicial admission of Roadmaster Neely that in 1955, 1/3rd of the ties had to be removed from the industrial track in question because they were rotten, at which time 2/3rds of the ties remained in place; that he

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of "unavoidable accident" and a material issue to establish liability was contrary to the great weight and preponderance of the evidence so as to require a reversal of the cause for a new trial.

[9] Jesionowski v. Boston & Main R.R.Co., (1946), 329 S.W. 452, 67 S.Ct. 401, 91 L.Ed. 416; Lavender v. Kurn, (1946), 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (absence of probative facts to support the conclusion reached (jury) does a reversible error appear); **Rogers v. Missouri Pac. R. Co.**, 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed.2d 493.

[10] Continental Oil Company v. Lindley, (Tex. Civ. App. 1964, ref. n.r.e.) 382 S.W.2d 296, where it was said: "If the evidence does not raise the issue that something other than the negligence of a party to the event caused the injury, an issue on unavoidable accident should not be submitted."

knew nothing about the Diesel switch engine derailing on the track or that a rail broke on October 17, 1960 (date Petitioner was injured) until he was called to testify that morning; that he had not been to the industrial track (in vicinity) from 1955 until May 13 or 14, 1963, (about a week prior to trial of this cause), and his admission a rail had less chance for a rail to break if the ties were in good shape; that the track was an old 60 pound rail, and an engine will push the rails out from under the wheels so it will fall between the rails and bad ties will cause a *wobble effect*, and if spikes are out, the rails spread out and will cause a derailment, the Court of Civil Appeals gave no probative force to such admissions of Roadmaster Neely. Such admissions should have been given conclusive effect.[11] In lieu thereof, the court gave probative force to incompetent hearsay testimony[12] of Roadmaster Neely concerning the general duty of Respondent to inspect its tracks, but no one *actually* testified concerning any inspection made of the track in question at any time prior to the injury to Petitioner in 1960. Track inspector Welch was the person charged with such duty in 1960, but he was ill, and could not or did not testify. While there was testimony from track inspector Dukes, he did not have any duty to inspect tracks until approximately three months (March 15, 1963) prior to the trial

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[11] Texas & P. Ry. Co. v. Wood, 145 Tex. 534, 199 S.W.2d 652.

[12] Henry v. Phillips, 105 Tex. 459, 151 S.W. 533, 538; American General Insurance Co. v. Jones, 152 Tex. 99, 255 S.W.2d 502 (1953); Aetna Insurance Co. v. Klein, 160 Tex. 61, 325 S.W.2d 376, 381; Cross v. Houston Belt & Terminal Ry. Co., (Tex. Civ. App. 1961, writ ref. n.r.e.), 351 S.W.2d 84. "* * * When the appellate court comes to apply the law to testimony constituting the facts of the case, it can only base its conclusion upon such testimony as is under the law competent. That which is not competent should be given no probative force. * * *", Henry v. Phillips, supra.

of this cause. On the other hand, the court gave *no* probative force to the testimony of Petitioner and his disinterested witnesses, Walter B. Kyle and Everett S. Kyle, which stands uncontradicted in the record, which if same had been untrue Respondent could have contradicted such testimony by producing as its witnesses, Assistant Trainmaster Martin and Mr. Smiley, who arrived immediately after the derailment of the engine (rerailed itself) and the rail broke on October 17, 1960, to take Petitioner and another injured member of the crew, Mr. McLeod, to the Southern Pacific Hospital and Clinic for treatment of their injuries. Moreover, no member of the Roundhouse crew or Section crew testified in behalf of Respondent even though each crew came to the scene to mend the engine and track so that the engine could be moved from the scene. Roadmaster Neely *assumed* the rail was sent to the Reclamation Yard. The appellate court should have given conclusive effect to the testimony of Petitioner and his disinterested witnesses, who testified to the fact the engine wobbled on the track, spikes were out, the rail was rusty, and the ties were squashed and rotten.[13] The appellate court gave no probative effect to the testimony of Petitioner and his disinterested witnesses, and felt free to disregard same, as well as the *presumption of negligence* where an engine derails.

The jurisdiction of this Court is sought to remedy an unjust verdict that has the effect of depriving Petitioner of a fair trial under the provisions of the Seventh Amendment of the United States Constitution to enforce his federally created rights under the provisions of the FELA.

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[13] McQuire v. City of Dallas, 141 Tex. 170, 170 S.W.2d 722, 728; Simonds v. Stanolind Oil & Gas Co., 134 Tex. 332, 350, 114 S.W.2d 226, 136 S.W.2d 207; Missouri-Kansas-Texas RR Co., v. McFerrin, 156 Tex. 69, 291 S.W. 931, 941.

QUESTIONS PRESENTED

I. Is the Petitioner precluded in this FELA case from securing a new trial because it calls upon this Court or an appellate court to examine the whole record to determine whether the facts support the judgment rendered adversely to Petitioner, based on the jury's finding to Special Issue No. 1, that exonerated Respondent of negligence under the holding of this Court in *Deen v. Hickman*, 358 U.S. 57, 79 S.Ct. 1, 3 L.Ed. 2d 28? If so, how may an employee under the FELA secure relief from an unfair and unjust verdict of a jury in pursuance of his right to a jury trial under the Seventh Amendment of the United States Constitution?

II. Where the undisputed evidence establishes that Respondent failed to properly maintain the industrial track in question on October 17, 1960, was not negligence established, as a matter of law, within the meaning of that term under Section 1 of the FELA, wherein it is provided a railroad is liable for any defect or insufficiency of its track and roadbed?

III. Is the affirmative defense of "unavoidable accident" available as a defense in this suit brought under the FELA where, under the substantive law of Texas and the local rules of practice and procedure, Respondent is required to plead affirmatively the defense of "unavoidable accident", but the burden is upon Petitioner to prove the event was not the result of an unavoidable accident?

IV. Is the prejudicial effect of the trial court in submitting Special Issue No. 3, inquiring about whether the event was an unavoidable accident, to the rights of Petitioner under the FELA determined before the answer that the event was the result of an unavoidable accident, which answer is rendered immaterial under the holding of the Court of Civil Appeals because of the negative answer of the jury to Special Issue No. 1 to the effect that Respondent was not guilty of any act of negligence?

V. Was Petitioner deprived of a fair trial when counsel for Respondent repeatedly conducted a cross-examination in violation of the trial court's order sustaining Petitioner's motion in limine to suppress the fact that Petitioner had had other injuries and had filed a suit on such claim?

STATUTES INVOLVED

The Statute involved is Section 51, Title 45, U. S. Code, known as the Federal Employers' Liability Act. (Appendix I)

The Seventh Amendment to the Constitution of the United States, providing for the right of trial by jury, and "no fact tried by a jury, shall be otherwise be re-examined in any Court of the United States, than according to the rules of the common law". (Appendix J)

STATEMENT

On October 17, 1960, Petitioner, a switchman employed by Respondent, was engaged in the performance of his

duties as a switchman and as a member of a switching crew. This crew included engineer, E. Clark; fireman Duncan; engine foreman A. McLeod (boss of the switchmen); highball man, E. S. Kyle; his brother, W. B. Kyle; the pin puller, (fieldman) and Petitioner (S.F. 63); back side of Respondent's Exhibit No. 2. Petitioner and two other switchmen namely, Walter B. Kyle and his brother, Everett S. Kyle, testified at the time of trial. The foreman, W. A. McLeod, on the date of the incident made the basis of the trial, was subpoenaed to testify, but neither Petitioner nor Respondent called him to the stand. *Respondent did not call any member of the crew to testify in its behalf.* About 10:30 o'clock on October 17, 1960, the crew was performing switching duties on an industrial track known as the Old Oriental Textile Lead or track when the incident of the Diesel switch engine, weighing approximately 232,000 pounds, was temporarily derailed when a section of the rail broke. The area where the industrial track was located was called the "Heights" area in the city limits of Houston. It is also through this "Heights" area the main lines of Respondent are located for the arrival and departure of Respondent's passenger and freight trains.

At the time the rail broke, engineer Clark and fireman Duncan were riding in the cab of the engine. The engine was proceeding at a speed of 6 or 8 m.p.h. in a backing movement (W. B. Kyle, S.F. 338); no cars were attached to the engine and it was proceeding toward the main line track. The three members of the switching crew who were riding on the outside portion of the engine were W. B. Kyle, engine foreman McLeod, and Petitioner. The other switchman, Everett S. Kyle, was at the main line switch, which was approximately 300 feet from the place where the accident occurred, but he heard the engine stop (S.F.

395-6). After the temporary derailment of the engine (called temporary derailment because it rolled back onto the track), a Mr. Martin, assistant trainmaster, came out to the scene in a company car and took petitioner, as well as Mr. McLeod, to the S. P. Hospital and Clinic; the section crew came to repair the track, and a roundhouse crew came out to repair the engine so that it could be moved on the track (S.F. 397-8).

Neither Mr. Martin, assistant trainmaster, nor any member of the two repair crews who came to the scene shortly after the rail broke testified, and the section of rail which broke was not introduced in evidence.

While the Diesel engine shown in plaintiff's Exhibits Nos. 1 through 5 is not the same Diesel switch engine that was involved in the event, it is one of the same type with reference to the location of the side steps and front footboard. The engine was equipped with a metal plate which was used to support the wooden footboard, and bolts secured the plate section to the engine. Petitioner was standing on the footboard, attached to the front of the engine, and McLeod was standing on the footboard facing the engine. W. B. Kyle was standing on the bottom step holding onto the grabirons facing sideways to the motion of the engine (W. B. Kyle, S.F. 338, 340; Hammons, S.F. 64-5). With the exception of one small bolt, all of the bolts securing the footboard to the engine broke loose, as well as the whole steps (S.F. 348-49).

Everett S. Kyle testified that the roundhouse crew found a bolt and wired the steps and platform to keep it from dragging on the tracks to get the engine moved to the

roundhouse. (S.F. 398) The rail that broke was a 60-pound rail to a yard, which was a light rail that had not been manufactured since 1903. The rail was probably laid in the late 1880's or 1890's (Roadmaster Pat Neely, S.F. 501-2, 514; Walter B. Kyle, S.F. 343; Everett S. Kyle, S.F. 393).

Walter B. Kyle testified that just before the rail broke, the engine was rolling along the Old Oriental Textile Lead at 6 to 8 m.p.h. It was wobbling on the track. The track did not have any up-keep and the track condition was poor. The ties had rotted out underneath the track and the rail was rusty. Some of the spikes had rusted off. A complaint had been made about it. With the small rail put on the bed, with rotted out ties and rotted out spikes, which had rusted or rotted off, the track did not hold up the heavy engine (S.F. 343-6). When the rail broke, it actually hit the end section of the engine, which he heard and felt. He looked at the rail later. It had been broken in two places, which was a new break (S.F. 349-50). Petitioner was knocked off between the rails and landed on his knees. When the engine dropped down, it went right through the ties, because the ties were rotten, and the train engine dropped on through so there was just a hull left. The spikes and the rotten ties made the rails wobble and give with the cars and engine as they rolled along. (S.F. 375).

Everett S. Kyle, a switchman, testified in behalf of Petitioner. He was at the main line switch at the time he heard the engine stop, but when it didn't start up and come out, he went to the scene to see what had occurred. The Old Oriental Textile Lead track was old and a lot of ties were decayed or partially decayed; the rail was very

light and narrow. At the place where the rail broke, he could see the ties and where the engine hit the ground. It smashed the ties. The ties were not splintered but were *"squashed"*. The broken rail was a 10-foot section of the rail; there was a *new break* in one part and at two places; there were six ties that were broken (like hulls) which he could see. The engine ran down to the dirt and the ties before it rerailed itself. While he had never inspected the ties before the rail broke, the ties were not splintered but were "squashed" after the rail broke (S.F. 390-399-400). He had seen derailments on brand new ties, but the ties were not squashed and were "cut pretty bad" (S.F. 431-2). The dirt was up to about level to the top of the ties and over part of the ties. Unless there was a severe change of weather, the rails did not break if the tracks are kept in proper condition (S.F. 448). On cross-examination, Everett S. Kyle testified as to the number of changes made in the track following the breaking of the rail and derailment in October of 1960 (S.F. 417-19).

Petitioner Hammons testified that at the time he was injured the Textile Lead track was in very bad shape; there was not any dirt around the rail; the ties had rotted out from under it; no spikes to hold the rail down; there was a section where the rail was loose because the spikes were out; the rotten ties couldn't hold the spikes; he had worked on the Textile Lead track for a number of years, which he estimated was 15 (S.F. 41-44). In some places there were rocks and ballast up to the level of the ties, but there was no ballast in and around the ties on the Textile Lead. He had been working the daylight shift for about five years and he would go into the location to switch cars for the two industries, Eagle Insulation and Consolidated Blinds,

on the Textile Lead; he estimated he worked on that Lead about once a week or every two weeks (S.F. 53-59). Prior to the time that the ten-foot section of the rail broke, the engine was bouncing and he heard the racket. The steel plates hit his knees as well as his stomach. He was knocked from the footboard onto the rails, where both knees struck the rail and were bleeding before he was taken to the hospital (S.F. 61-72, 73-76). While he was waiting to be taken to the hospital, he noticed that the ties were rotten and the rail was broken at both ends. He and Mr. McLeod were taken to the hospital by Mr. S. N. Martin, assistant trainmaster over the territory, and Mr. Smiley was with him (S.F. 78, 81).

Without calling any member of the switching crew with whom Petitioner was working on October 17, 1960 to testify, Respondent did not call assistant Trainmaster Martin or Mr. Smiley to testify or any member of the roundhouse crew or section crew who arrived at the scene shortly after the derailment and the rail broke. Respondent chose to call Roadmaster Neely to testify in its behalf, who knew nothing about the incident of October 17, 1965 until he was called to testify. He identified Respondent's Exhibit No. 3 (plat of the tracks and land); he identified "Courtney Brink & Co." as the place where the Eagle Insulation Company was located on the north side of the Industrial track (S.F. 518). He also marked on the map where a portion of the track that was closed at Nicholson Street and indicated by writing in ink on the plat the portion of the track that was taken out in 1962, by drawing on the plat a straight ink line with a crossed ink line at each end of the straight line and writing "out in early 1962." The portion of the track that was taken out in 1962 was

in place at the time of the incident occurring on the track when the rail broke (S.F. 540-41; 517). [Switchman Kyle, a member of the crew at the time Petitioner was injured, *circled with ink* on the plat where the rail broke (S.F. 415).] Roadmaster Neely testified that there were no warehouses at the immediate spot where the incident of the broken rail occurred; there were no doors to the industry there in 1960—unloading had to be done on the ground. In 1960 no trucks could use the track or go through there because of the condition of the rails and ties (S.F. 519-20). It is not clear from Neely's testimony whether the track was spiked in 1943, 1944 or 1945. He did testify, however, that the track was rehabilitated in 1955 and put in good operating condition again (S.F. 498-500). At the time of the rehabilitation of the track in 1955, about 250 ties had to be replaced in the 1400 or 1500 feet of track off the main line, (not including the extreme end) which meant about *one-third of the cross-ties were removed and replaced and the other two-thirds of the cross-ties were left in place because they were serviceable.* The tracks were raised three to four inches to get up to the street. While he testified that some new rails were added, such rail must have been added in the Nicholson Street track, because the undisputed evidence established that it was a 60-pound, or lighter pound, rail on that portion of the track where the rail was broken. He personally looked at the rail in 1955 on the industrial track; it was a rail 60-pounds to the yard which was put in about 1900 (S.F. 502). *He admitted that he did not know anything about the broken rail on the Textile Track and did not know anything about the rail breaking until the morning he testified in court* (S.F. 505, 538). *He admitted, on cross-examination, the dirt which he had testified to being placed on the track in 1962* (S.F. 521).

In 1960 the track, (rails and ties) had sand and screen, which were used for ballast, were *almost* to the top of the ties, and it was impossible for a truck to go through there (S.F. 520-21). Neely admitted that a rail would give way if the ties were bad and *rotted out, the tie collapses leaving nothing but a shell or hull* (S.F. 530-31). *He further admitted that there was less chance for a rail to break if the ties were in good shape. If several ties were rotted out, it will give a little, which will cause a rail to break. The engine will push the rails out from under the wheels and the engine will fall in between the rails. The bad ties will cause a wobble effect; if spikes are out, the rails spread out, which allows the wheels to drop between the rails, which will cause wide gauge, a term of the railroad when ties get so weak or the spikes get so weak that the rails spread apart and will cause derailment* (S.F. 530-36). Creosote ties last longer when covered—the air does not get to them (S.F. 530-536). *Neely admitted he never did see the 10-foot section of the track which broke in two pieces* (S.F. 537). Neely, then, testified that, *based on the history,* it was his opinion the Industrial Track *should be in first class condition.* He did not go out and inspect the track after the rail broke because he had not heard about it until the morning he was testifying (S.F. 538). Neely admitted, on direct examination, that he had personally been to the Textile Track on the occasion the track was laid in 1955, and again on May 13 or 14, 1963, (S.F. 505) when he was seeing about whether it needed some weed killer in that area. He admitted he had not received any reports of bad ties and that he had not been out to check the track. Mr. Johnny Wakefield and Mr. Krome were assistant roadmasters at the time the rail broke, and the engine was derailed;

it was probably reported to the assistant roadmasters to set the wheels in motion to repair the track. The assistant roadmasters were with the railroad at the time of the trial. Neely or his assistants should have been notified and gone out and inspected the track after the rail broke. (S.F. 539). Neither Mr. Wakefield nor Mr. Krome testified. Neely admitted the track inspector of the track in question worked under him, and there was only *one* track inspector, who was Mr. Walter Welch, who had the duty to inspect the track in question at the time of the incident of October 17, 1960. At the time of trial, Mr. Welch was in or just out of the hospital and had stopped working on February 22, 1963, because of a heart attack. Mr. Welch did not testify either by deposition or in person at the time of trial. (S.F. 529)

A considerable portion of Neely's testimony is devoted to *hearsay t*estimony, which has no probative force, including testimony that it was the duty of one inspector to inspect 321 miles of track in Houston; that the Sperry car (electronic inspection car) was used on the main line to test for broken rails, but it couldn't be used on industrial tracks because it would not test a *dirty rail and they could never find one clean enough to test industrial tracks.* (S.F. 506-10). He assumed the broken rail in question was taken to the Reclamation Yard. He further testified that a defect in the metal of a rail will cause it to break, as well as changes in the weather, and that in the operation of a railroad it was a *common occurrence* for rails to break. *Roadmaster Neely admitted the railroad couldn't afford to spend much money for rock ballast on an industrial track* (S.F. 527). There is no evidence in the record of any *sudden change* of temperature or in the weather. There had been some rain.

At the conclusion of the trial, the trial court submitted to the jury five (5) special issues. In response to Special Issue No. 4, Petitioner was awarded $1,261.60 for medical expenses he had incurred by reason of his injuries on October 17, 1960, and in answer to Special Issue No. 5, Petitioner had been damaged in the amount of $5,000.00 by reason of the injuries sustained by him. However, the jury, in response to Special Issues No. 1 and Special Issue No. 3, found "We do not" to the inquiry of whether the railroad failed to maintain the track in question in such manner as would have been done by a reasonably prudent railroad company in the exercise of ordinary care under the same or similar circumstances (proximate cause issue not answered by reason it was predicated on an affirmative or "We do" answer to Special Issue No. 1), and the occurrence was the "result of an unavoidable accident."[14] (Prior to the submission of the unavoidable accident issue, Petitioner timely objected to the submission of such issue on the ground, among others, there was no evidence to support the submission of such issue appendix k.) Thereafter, judgment was rendered on the verdict by the trial court, which was a take-nothing judgment against Petitioner in favor of Respondent. The verdict of the jury is set out in the judgment, together with the special issues submitted to the jury. (Appendix G)

Petitioner sought a new trial from the trial court at the hearing on Petitioner's amended motion for new trial based on proper assignments of error attacking the verdict of the jury, and the negative answer of the jury to Special Issue

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[14] The term "unavoidable accident" was defined as follows: By the term "unavoidable accident" is meant an accident which is not proximately caused by the negligence of either the defendant or the plaintiff. (Appendix G — Sp. Iss. No. 3; also Tr. 10-14)

No. 1 had no support in the evidence, insufficiently supported by the evidence, and that as a matter of law the negative answer of the jury to Special Issue No. 1 wrong and erroneous, in that the FELA expressly made defendant liable for injuries caused by defects in its tracks, as was shown without dispute in the evidence, which raised a Federal question under the Act, and the answer was against the great and overwhelming preponderance of the evidence. There was *no evidence* the occurrence was the result of an unavoidable accident, and the answer was contrary to the evidence, and against the great weight and overwhelming preponderance of the evidence, and by assignment of error No. X. unavoidable accident was not an ultimate or controlling issue in the case under the FELA. Such issue should not have been submitted, in that it merely gave defendant an undue advantage by emphasizing defendant's theory of the case, and submitted merely the converse of primary negligence issues, which raised a Federal question under the FELA. (Appendix N). The motion for new trial was overruled, and an appeal was duly perfected, but the Court of Civil Appeals did not accord Petitioner any relief from an unjust verdict.

Petitioner was deprived of a fair trial when counsel for Repondent went beyond all permissible limits of cross-examination of Petitioner and his witnesses concerning a previous injury sustained by him while working for Respondent in 1952 when he was thrown from the top of a box car during a switching movement when another car was kicked with force against the car Petitioner was riding. Petitioner filed a motion in limine prior to trial to limit cross-examination about the 1952 injury, which the trial court granted. (Appendix L) As a consequence of such violation, the record, to the prejudice of Petitioner, was

permeated by a comparison of the claims pertaining to the injury in 1952 and claims pertaining the injury occurring in 1960. Excerpts of such cross-examination of Petitioner and his witnesses are attached hereto as Appendixes, as follows: Appendix S-1, cross-examination of Petitioner; and of his witnesses: Thomas M. Hairston, Appendix S-2; Dr. Frank O. McGehee, Appendix S-3; Walter B. Kyle, Appendix S-4 and Everett S. Kyle, Appendix S-5 to which the attention of this Court is directed. Such cross-examination must have led to much confusion, especially when counsel for Respondent "popped" his knee while interrogating Dr. Frank O. McGehee even though the Doctor, who had performed an operation on Petitioner's left knee, testified what he was talking about in respect to Petitioner's knee was *not* the same thing. In the opinion of Dr. McGehee, Petitioner sustained a permanent injury to his knees which would grow worse and Petitioner would have difficulty in walking, bending and stooping, and would suffer pain, which would cause him to limp. (S.F. 202-03) He had advised Petitioner he should stop doing the work of a switchman because such work kept his knees aggravated (S.F. 197-202).

The Texas Rules of Civil Procedure, Rules 1 and 434 provide for proper objectives to obtain a fair, just, equitable and impartial adjudication of the rights of the litigants under established principles of substantive law, and a reversal, if error is such as a court of civil appeals is of the opinion there is a denial of the rights of appellant by an error that was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case. (Appendix O and Appendix P) The Court of Civil Appeals did not reverse this cause for a new

trial, and refused to consider a portion of the Brief for Appellant even though Rule 418 (c) provides for a summary of the testimony, with page reference to the record, and Rule 431 provides the court of civil appeals shall grant the right to amend. (Appendixes Q and R respectively.) The Court of Civil Appeals improperly denied Petitioner a new trial because of the prejudicial errors committed in the trial court by which Petitioner was precluded from having a fair trial, based on the record in this cause.

HOW THE FEDERAL QUESTIONS WERE RAISED

Petitioner brought suit against his employer, Respondent herein, to recover damages for severe bodily injuries sustained by him because of the defective track, causing such injuries, and that the cause of action arose under and is governed by the FELA, 45 U. S. Code, Section 51, as amended by the Act of August 11, 1939.

By assignment of error in paragraph III of Plaintiff's Amended Motion for New Trial, as a matter of law, the negative answer of the jury to Special Issue No. 1 was wrong and erroneous in that the FELA expressly makes the defendant liable for injuries caused by defects in its tracks, as shown without dispute in the evidence, and the undisputed evidence established that plaintiff's injuries were proximately caused by the negligence of the defendant, its agents and employees, in failing to properly maintain the tracks upon which plaintiff's accident occurred, and in permitting the track to remain in defective condition with rotten cross-ties. By assignment of error No. X. of the same amended motion for new trial, the Court erred in submitting Special Issue No. 3, on unavoidable accident, in that it was not an ultimate or controlling issue in the

case, under the FELA, and should not have been submitted, in that it merely gave Respondent (defendant) an undue advantage and was converse to primary negligence. By assignment of error V, there was no evidence the event was an unavoidable accident.

By assignments of errors Nos. XI and XII, the trial court erred in failing to grant a mistrial, and entire conduct of counsel for Respondent (defendant) repeatedly referring during the trial had the cumulative effect to prejudice Petitioner (plaintiff) and deprive him of a fair trial. (All assignments of error in Plaintiff's amended motion for new trial, which were overruled by the trial court. Appendix N)

ARGUMENT

I. Is the Petitioner precluded in this FELA case from securing a new trial because it calls upon this Court or an appellate court to examine the whole record to determine whether the fact support the judgment rendered adversely to Petitioner, based on the jury's finding to Special Issue No. 1, that exonerated Respondent of negligence under the holding of this Court in *Deen v. Hickman*, 358 U.S. 57, 79 S.Ct. 1, 3 L.Ed. 2d 28? If so, how may a FELA employee secure relief from an unfair and unjust verdict of a jury in pursuance of his right to a jury trial under the Seventh Amendment of the United States Constitution?

II. The verdict is contrary to the conclusive evidence and contrary to liability of Respondent as provided in Sec. 1 of the FELA.

The trial court should have granted Petitioner a new trial under the evidence adduced in the course of trial because the verdict of the jury in answer to Special Issue No. 1 was contrary to the evidence of probative force and effect. The negative finding of the jury to Special Issue No. 1 was an unjust verdict, based on speculation and conjecture, because the evidence of probative force adduced in the course of trial showed conclusively that Respondent failed to maintain the track in question in such manner as would have been done by a reasonably prudent railroad company in the exercise of ordinary care under the same or similar circumstances. When the trial court did not grant such relief from this unjust verdict, it then became the duty of the appellate court to grant such relief. This the appellate court did not do in the case at bar. Relief is here sought from such unjust verdict and judgment of the trial court in this cause.

Many cases are cited in the opinion of the Court of Civil Appeals, but, with the exception of one case, none of the Texas cases involve a factual situation where there was a derailment or a rail broke causing injury to an employee who was seeking damages under the terms and provisions of the FELA. The lone case so cited is *Mosby v. Texas & P. Ry. Co.*, (El Paso-Tex. Civ. App. 1945), 191 S.W.2d 55. That case, however, is factually distinguishable from the one at bar. There the railroad sought to prove, and did convince the jury, the derailment and the broken rail was by reason of a defect, called a transverse fissure, in the rail based on the testimony of General Roadmaster Stevens and a Mr. Moore, *who went to the scene of the accident and examined the wreck and broken rail.* Moreover, it there appears the rail was preserved to test the percentage of

crystalization in the rail where it was broken in two pieces. The cause was reversed and remanded for a new trial because of prejudicial evidence and argument concerning Mosby's retirement annuity.

Such is not the factual situation in the case at bar. The evidence shows the broken pieces of the rail came into the possession of Repondent or could have come into its possession when the Roundhouse and Section crews went to the scene of the derailment and the place where the rail broke. Assistant trainmaster Martin and a Mr. Smiley arrived at the scene shortly after the incident occurred on October 17, 1960. Respondent did not call any of these witnesses to testify, and the record is completely silent of any *actual* inspection made of the track in question at any time remotely near the date of October 17, 1960. There is testimony that one Mr. Welch was charged with the duty of inspecting the track as he was charged with the duty of inspecting approximately 321 miles of track in Harris County, but *Mr. Welch did not testify* either by deposition or in person during the trial. The duty of a railroad in respect to its yards and tracks is thusly stated at 38 Tex. Jur.2d Sec. 62, p. 223, et seq.:

> "A railroad owes its employees a duty of reasonable care to furnish a safe place to work. It is fallacious to suppose that the law looks only to the safety of passengers or requires that tracks be made safe from the sole point of view of running trains thereon.* * * *It is the nondelegable duty of the railroad to exercise ordinary care to furnish the safe roadbeds and tracks over which its employees are required to pass.* * *

> "Where a prima face case of liability appears because the injury was due to worn rails, absence of braces or otherwise, the railroad is not exonerated by the em-

ployment of competent inspectors of the permanent way, *unless it is further shown that proper inspection was made, and the failure to discover obvious defects is accounted for.* Even if a defect is not apparent to te eye of a passing observer, *the employer is liable where a skilled inspector would have discovered it. Where a track is shown to have been defective in some respect, a derailment, being an accident that in the ordinary course of things does not happen when ordinary care is used, is sufficient predicate for implying absence of ordinary care, throwing responsibility for the defects on the railroad.* (Emphasis supplied)

The liability of a railroad for defects in its tracks and roadbed is found under the FELA, 45 U.S. Code, Sec. 51, as amended August 11, 1939, wherein it is provided, in part, as follows:

* * * *

"Every * * * railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, * * * or other equipment."

The Texas courts have held in FELA case that where there is proof of a derailment of an engine upon which the injured plaintiff was riding, the burden of proceeding then passes to the defendant to overcome the inference that the resulting injury to plaintiff was due to the railroad's negligence. *Thompson v. Jason,* (Galveston-Tex. Civ. App. 1954, writ ref. n.r.e.), 265 S.W.2d 920; *Thompson v.*

Brown, (Waco-Tex. Civ. App. 1949), 222 S.W.2d 442. This Court applied the same rule in *Jesionowski v. Boston & Main R. R. Co.,* (1946), 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 416.

In *Denver & Rio Grande Western RR Co. v. Conley,* (10th Cir. 1961), 293 F.2d 613, an administratrix brought suit for the death of her husband under the FELA. There the court pointed out the *undisputed facts showed* the decedent received injuries to his back when the switch engine on which he was riding passed over a faulty section of track, on which a rail broke, causing him to be thrown to the ground. While there the track in question was neither owned nor maintained by the defendant, such is not the case at bar because Respondent admitted it maintained the track. The Circuit Court pointed out there was ample proof that the rail had become dangerously deteriorated after more than 30 years use, and the duty the law imposed upon the railroad to inspect the tracks over which it moves its trains imputes to it constructive knowledge of the unsafe condition. To the same effect is the case of *Beattie v. Elgin, Joliet & Eastern Ry. Co.,* (7th Cir., 1954), 217 F.2d 863. Notice of defects and dangers were imputed to the master where they could have been discovered by reasonable inspection and by exercise of reasonable care. The principles of law announced in the foregoing cases were expressly approved by this Court in *Shenker v. Baltimore & Ohio R.R. Co.,* (1963), 374 U.S. 1, 83a S.Ct. 1667, 10 L.Ed.2d 709.

What is the probative force of the testimony of Petitioner and his disinterested witnesses, Walter B. Kyle and Everett S. Kyle, who testified concerning the derailment of 232,000 pound Diesel engine and the condition of the

track in question when the rail broke? Their testimony stands uncontradicted by any testimony that has probative force, concerning the condition of the track in question on October 17th, 1960. The appellate court should have given conclusive effect to their testimony. *Missouri-Kansas-Texas RR Co. v. McFerrin,* (1956), 156 Tex. 69, 291 S.W.2d 931, at 941. See also, *McQuire v. City of Dallas,* (1943), 146 Tex. 170, 170 S.W.2d 722, 728; *Simonds v. Stanolind Oil & Gas Co.,* 134 Tex. 332, 350, 114 S.W.2d 226, 136 S.W.2d 207. The presumption obtains that where the Respondent failed to call witnesses who have knowledge of the facts, and whose testimony is available to Respondent, such failure creates a presumption that the testimony, if produced, would have been unfavorable to it. *St. Paul Mercury Ins. Co. v. Jackman,* (Eastland-Tex.Civ.App., 1960, writ ref. n.r.e.), 331 S.W.2d 253. Respondent did tender testimony through Roadmaster Neely that the track inspector, Mr. Welch, was charged with the duty to inspect track on and before October 17, 1960. However, at the time of trial in May, 1963, Mr. Welch was in or just out of the hospital because of a heart attack, and he had retired. There is *no positive testimony* that Mr. Welch's health was such that he could not testify. Be that as it may, there is not any scintilla of evidence in the record of an explanation of why Respondent did not call Assistant Trainmaster Martin, or some member of the Roundhouse crew and Section crew, who came to the track in question shortly after the derailment and the rail broke, on October 17, 1960, to contradict the testimony of Petitioner and his witnesses, if same had not been true. Moreover, the rail in question came into the possession of Respondent, or pieces of it on October 17, 1960, but the rail or pieces

of it were not tendered into evidence. Thus the truth of the facts testified to by Petitioner and his witnesses stand uncontradicted. Despite such presumption in favor of Petitioner, the Tyler Court of Civil Appeals *disregarded* such testimony, and gave probative force to the *hearsay* testimony of Roadmaster Neely and Mr. Dukes, a person who did not even become a track inspector until March 15, 1963—three months before the trial of this cause, in a record that shows changes of condition in the track in question subsequent to October 17, 1960.

Respondent sought to show the condition of the track in question on October 17, 1960 by producing Roadmaster Neely, and Mr. Dukes. Without purporting to bring into court any business records kept in the regular course of business concerning the track in question, on October 17, 1960, Respondent sought to show the condition of the track through the testimony of Roadmaster Neely by *hearsay* testimony, which has no probative force. Neely had not been notified of the derailment of the engine on that date, or of the fact, a rail was broken in two pieces. He judicially admitted he knew nothing about the incident of October 17, 1960, which resulted in injuries to Petitioner until the morning he was called to testify. The trial of the cause began on May 20, 1963 (S.F. 1). He judicially admitted he had only been to the track in question on two occasions, namely, in 1955 when the track was rehabilitated, and the second time, on or about May 13 or 14, 1963 when he went out to the track to see if any weed killer was needed there. Respondent is bound by his judicial admission of the condition of the track in 1955. The jury may have been justified in believing Neely may have inspected the track in 1955, but no such inference could be drawn he made any other inspection. At that

time, one-third of the cross-ties were rotten and they were removed, and two-thirds of the cross-ties remained in place. The rail was 60 pounds to the yard. A rail that had not been manufactured since 1903, and had probably been laid about 1900, and the track was dirty and full of debris. The railroad could not afford to put ballast out there. Roadmaster Neely never makes any positive statement that he ever personally inspected the track in question except his claim of the rehabilitation of the track in 1955. Compare the date of the so-called rehabilitation of the track with an affidavit of retired Assistant Roadmaster Poarch attached to Respondent's Reply to the Petitioner's Amended Motion For New Trial. Appendix M.

The manner in which Roadmaster Neely made an inspection is no proof of how track inspector, Mr. Welch, who was charged with the duty of inspecting the track in question on and prior to October 17, 1960, *actually* made this inspection of the track in question. This Court will note the state appellate court gave Neely's testimony credibility and that of Mr. Dukes and never mentions, in the course of the opinion, the presumption of negligence obtained under the uncontradicted testimony of Petitioner and his witnesses, Walter B. Kyle and Everett S. Kyle. The holding of the Court of Civil Appeals is contrary to the law as announced in *Henry v. Phillips*, 105 Tex. 459, 151 S.W. 533, 538, that, "When the appellate court comes to apply the law to testimony constituting the facts of the case, it can only base its conclusions upon such testimony as is under the law competent. That which is not competent should be given no probative force." Hearsay evidence, admitted into evidence without objection, is incompetent to establish any fact, and such incompetent evidence can never form the basis of a finding of fact or of the judg-

ment of a court, *Texas Co. v. Lee,* (1941), 138 Tex. 167, 157 S.W.2d 628. The same rule is equally applicable to opinion evidence. *Casualty Underwriters v. Rhone,* (1939), 134 Tex. 50, 132 S.W.2d 97. The attention of this Court is directed to the following cases where such evidence was held incompetent: *American General Ins. Co. v. Jones,* 152 Tex. 99, 255 S.W.2d 502 (1953); *Aetna Insurance Co. v. Klein,* 160 Tex. 61, 325 S.W.2d 376, 381 (1959); *Cross v. Houston Belt & Terminal Ry. Co.,* (Houston-Tex.Civ.App. 1961, writ ref. n.r.e.), 351 S.W.2d 84.

When the record in the case at bar is stripped of the incompetent testimony of Roadmaster Neely and Mr. Dukes, there is no testimony that contradicts the testimony of Petitioner and his witnesses, so a presumption of *negligence* exists which Respondent did not rebut. Thus Respondent is liable to Petitioner for his injuries by reason of the defects and insufficiency of the track in question under Sec. 1 of the FELA. Moreover, at least some of the ties were rotten, according to Petitioner and his witnesses in 1960. Roadmaster Neely admitted in 1955 one-third of the ties were rotten in this roadbed and had to be replaced but *two-thirds of the ties were left in place* so there was an ample lapse of time for the ties in this track to deteriorate, especially when sand and shell ballast was used on the track because the railroad could not afford to use rock ballast on an industrial track. (Neely's Adm. S.F. 527-28). Furthermore, there is no competent evidence Respondent discharged its duty to properly inspect the track at or prior to October 17, 1960, which it was required to do in law.

It is respectfully submitted this cause is not controlled by *Deen v. Hickman,* 358 U.S. 57, 79 S.Ct. 1, 3 L.Ed.2d

28. The proof showed negligence on the part of Respondent, which was not contradicted by Respondent by any competent testimony that had probative force. Long ago this Court established the rule that a court must, in relation to the jury, protect parties from unjust verdicts arising from ignorance of rules of law in evidence, from the impulse or passion or prejudice, or from any other violation of his lawful rights and in the conduct of trial. *Pleasants v. Fant*, 89 U.S. 116, 22 Wall. 116, 22 L.Ed. 780. Moreover, a jury is not free to speculate. *Galloway v. United States*, (1943), 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 504, reh. den'd, 320 U.S. 214, 63 S.Ct. 1443, 87 L.Ed. 851. Since the State appellate court did not remedy the abuse of Petitioner's rights by according Petitioner a proper appellate review based on testimony that had probative force, this Court is urged to take jurisdiction and correct the abuse. *Dick v. New York Life Ins. Co.*, (195), 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935.

The case at bar is one where this Court should analyze the facts or by a re-examination of facts for determining whether the rules of federal law have been improperly applied to the facts, as this Court did, in *New York Times Company v. Sullivan*, 376 U.S. 254, 287, 84 S.Ct. 710, 729, 11 L.Ed.2d 686, 95 ALR 2d 1412, mot. den'd 376 U.S. 967. Petitioner has been deprived of a fair trial in the State court, so that in effect, his federally created rights under the FELA have been taken away from him, as well as his right to a fair jury trial under the Seventh Amendment to the United States Constitution, Amend. VII, U.S. Const. Petitioner is the victim of an unjust verdict and judgment.

III. Is the affirmative defense of "unavoidable accident" available as a defense in this suit brought under the FELA, where, under the substantive law of Texas, and the local rules of practice and procedure, Respondent is required to plead the defense, but the burden is upon Petitioner to prove the occurrence "was not the result of an unavoidable accident?

IV. Did the submission of the issue have a prejudicial effect to the federally rights of Petitioner under the FELA.

It has heretofore been pointed out that the Court of Civil Appeals did not reach a decision on Petitioner's claim that Special Issue No. 3 of unavoidable accident was not a defense in this FELA because of that Court's holding that the jury failed to find any primary negligence on the part of Respondent, so that *any alleged* error with respect to the submission of same became immaterial. The mandate to a Court of Civil Appeals, in regard to what the Court should decide, is found in RULE 451, VERNON'S ANNOTATED TEXAS RULES OF CIVIL PROCEDURE, which reads as follows:

> "The Courts of Civil Appeals *shall decide all issues presented to them by proper assignments of error by either party, whether such issues be of fact or of law, and announce in writing their conclusions.*" (Emphasis supplied)

In *Strauss v. LaMark*, 366 S.W.2d 555 (1963), the Supreme Court reviewed a decision of the lower court wherein the jury had answered the unavoidable accident issue favorable to the defendants, that is, the event was an un-

avoidable accident, but in response to Special Issue No. 1, the jury made a *negative* answer to an issue inquiring whether plaintiff tripped over an electric cord in the aisle of defendant's beauty shop, a material issue on liability. The Supreme Court, is rendering its decision, agreed with the Court of Civil Appeals that the *issue of unavoidable accident was not raised by the evidence.* The presumed finding rule was not applicable in respect to Special Issue No. 1. The judgments of the courts were reversed and the cause was remanded to the district court for a new trial. Thus the Court of Civil Appeals should have ruled on Petitioner's point.

Whether or not the issue of unavoidable accident, in the case at bar, was prejudicial, the probable affect of such special issue on the minds of the jury, in the light of the charge and the evidence as a whole, must be considered, under *Rule* 434, *Texas Rules of Civil Procedure* (*Appendix P*); *Texas Employers' Insurance Assn. v. McKay* (1948), 146 Tex. 569, 210 S.W.2d 147. The rule is stated thusly at 4 *Tex. Jur.* 2d, Appeal and Error—Civil, Sec. 954, p. 616:

> "Error in the submission of issues to the jury may be prejudicial where it injuriously affects the substantial rights of the complaining party. The submission will be considered as a whole in determining whether the error was prejudicial to the complaining party, and whether it influenced the minds of the jurors.
>
> "Prejudice may result from a submission that confuses and misleads the jury, intermingles the issues, or places the burden of proof on the wrong party, and sometimes from the submission of an issue not warranted by the pleadings or evidence if harm was done, by the submission, to the complainant."

Thus, the Court of Civil Appeals was in error in holding that Petitioner waived any right to complain of Special Issue No. 3 on the issue of unavoidable accident on the ground that it was prejudicial. The matter was properly preserved for appellate review in Petitioner's amended motion for new trial. Contrary to its duty, the Court of Civil Appeals failed to rule on the point. There was no evidence of unavoidable accident.

From time to time the Texas rule concerning the issue of unavoidable accident has been changed in regard to the right of the submission of the issue, as well as in the definition of the term. In *Wheeler v. Glazer* (1941), 137 Tex. 341, 153 S.W.2d 449, it was there said:

> "The only legitimate purpose to be served *in submitting unavoidable accident is to call the matter to the attention of the jury, so that it will not be overlooked, and so that the jury will understand that they do not necessarily have to find that one or the other parties to the suit was to blame for the occurrence complained of.* This purpose is fully accomplished when the jury is told that the occurrence in question was an unavoidable accident if it happened without the negligence of either of the parties to the suit." (Emphasis supplied)

The *burden of proof is upon plaintiff to prove that the event was not an unavoidable accident, Hicks v. Brown,* (1941), 136 Tex. 366, 151 S.W.2d 790, 793, as well as prove primary negligence. *Rosenthal Dry Goods Co. v. Hillebrandt,* Tex. Comm. App. 7 S.W.2d 521; *Thurman v. Chandler,* 125 Tex. 34, 81 S.W.2d 489. After overruling Petitioner's objection there was "no evidence" raising the issue "unavoidable accident", which was the only objec-

tion that could be made to prevent the submission of the issue to the jury, the issue was submitted by the trial court. (Appendix K)

The complexity of the affirmative defense of "unavoidable accident" under the State practice and procedure is demonstrated in *Bradford v. Arhelger* (1960), 161 Tex. 427, 340 S.W.2d 772. There, it was held there was an irreconcilable conflict in the jury's findings, (1) that plaintiff's negligence was a proximate cause of the automobile collision, (2) that defendant's negligence was a proximate cause of the collision, and (3) that collision had been the result of unavoidable accident. Petitioner there filed a motion for mistrial, but it was overruled. The Supreme Court, however, by reason of the irreconcilable conflict, reversed and remanded the cause for a new trial.

Moreover, it has been judicially acknowledged the issue of "unavoidable accident" is confusing to the jury. See *Good v. Born* (San Antonio-Tex.Civ.App., 1946, writ ref. n.r.e.), 197 S.W.2d 589, 591; *Texas Power & Light Co. v. Jezek* (Waco, Tex.Civ.App., 1957, writ ref. n.r.e.), 302 S.W.2d 196, and dissenting opinion, where the judge ~~was~~ signed the trial court erroneously set aside the jury finding on the ground of "no evidence". The Fifth Circuit took judicial notice the issue, in a FELA case, was *confusing* in *Page v. St. Louis & W. Ry. Co.*, (1963), 312 F.2d 84, at page 83, but the matter had not been properly preserved by reason there was no objection the issue was "prejudicial".

Under the State practice and procedure, an objection of "prejudicial" to the submission of an issue is premature because whether the issue is prejudicial cannot be determined until the whole record has been developed. Rule 434, Texas Rules of Civil Procedure, Appendix P.; *Texas Em-*

ployers' Ins. Assn. v. McKay, (1948), 146 Tex. 569, 210 S.W.2d 147.

After counsel for Respondent requested, and insisted the issue on unavoidable accident be given to the jury, over Petitioner's objection there was no evidence raising the ~~issue raising~~, Respondent now claims it is immaterial and the Court of Civil Appeals agreed, despite the fact it was the appellate court's duty to determine whether the issue was raised by the evidence.

The unavoidable accident issue was given to the jury, with the burden cast upon Petitioner to prove the occurrence, "was not the result of an unavoidable accident" or securing a finding to that effect. (Special Issue No. 3, Appendix G) The jury was instructed by a definition of the term in substantially the language of the last approved definition of the term in *Dallas Railway & Terminal Co. v. Bailey,* (1952), 151 Tex. 359, 250 S.W.2d 379, 385 [the court took occasion to overrule the definition of the term as it theretofore had approved, and overruled the previous cases to that extent]. The definition given to the jury was:

> "By the term 'unavoidable accident' is meant an accident which is not proximately caused by the negligence of either the defendant or the plaintiff."

The definition, of course, effectively destroyed the effect of the presumption of negligence that obtained in the case at bar in favor of the Petitioner, in the minds of the jurors.

Thus, again, Petitioner was deprived of a fair trial where the State appellate court did not accord a proper appellate review to determine whether, in fact, the evidence raised

the "unavoidable accident", and whether the submission of same was prejudicial.

Despite the assignment of error No. X. in Petitioner's amended motion for a new trial, and a point presenting same to the State appellate court, Petitioner secured no ruling from the State appellate court that he had been deprived of his federally created rights under the FELA because "unavoidable accident" was not a proper defense in this action. The factual background of the case at bar created a presumption of negligence. Under such factual background, the issue of "unavoidable accident" was not presented by the evidence. Moreover, under the holding of this Court, the inferential rebuttal issue of "unavoidable accident" the conclusion is inescapable that the affirmative defense of "unavoidable accident", as known to the Texas practice, could not be used as a tool to defeat the remedy of an injured railroad employee under the FELA.

The issue of "unavoidable accident" under the Texas practice requires of an injured plaintiff to prove primary negligence and also, such plaintiff must carry the burden of securing a jury finding the event "was not the result of an unavoidable accident".[15] If he is successful in securing favorable answers from the jury on primary negligence, but unsuccessful in regard to the inferential rebuttal issue of "unavoidable accident", the injured plaintiff cannot secure a judgment based on the jury finding of negligence, because there then exists an irreconcilable conflict of findings, requiring a new trial.[16]

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[15] Rosenthal Dry Goods Co. v. Hillebrandt, Tex. Com. App., 7 S.W.2d 521; Hicks v. Brown, (1941), 136 Tex. 366, 151 S.W.2d 790, 793; Dallas Ry. & Terminal Co. v. Bailey, (1952), 151 Tex. 359, 250 S.W.2d 379, 383, 385.

[16] Blanton v. E. L. Transport Co., 146 Tex. 377, 207 S.W.2d 368; Bradford v. Arhelger, (1960), 161 Tex. 427, 340 S.W.2d 772.

In *Pope & Talbot v. Hawn,* (1953), 346 U.S. 406, 74 Sup. Ct. 202, 98 L.Ed. 143, it was held, in respect to a claim based on unseaworthiness of appellant's vessel, the maritime law must govern, and under such law, ***unavoidable accident is not a defense to an action based on unseaworthiness.***

A similar conclusion was reached in *Yanow v. Weyerhaeuser Steamship Co.,* (9th Cir. 1957), 250 Fed. 2d 74. There the Court reversed the judgment of the trial court, which charged the jury that, "There are such things as unavoidable accident—accidents which happen without the fault of anyone." The court concluded that such instruction was improper in a case of maritime injury. The Fifth Circuit reached the conclusion that unavoidable accident was not a defense to an action based on unseaworthiness in *Neal v. Lykes Bros. Steamship Co.,* (1962), 306 Fed. 2d 313, and in *Quintero v. Sinclair Refining Co.,* (1962), 311 Fed. 2d 217.

The question before a State appellate court, in a suit brought under the Jones Act, was whether the trial court had properly *refused* the submission of "unavoidable accident" in *Continental Oil Company v. Lindley,* (Houston-Tex.Civ.App. 1964, writ ref. n.r.e.), 382 S.W.2d 296. In holding that the trial court properly refused to submit the issue, it was there said:

> "Under the decision of the Supreme Court of the United States in Tiller v. Atlantic Coast Line R. Co., 1943, 318 U.S. 54, 63 S.Ct. 444, it seems questionable whether the defense of unavoidable accident is available to a defendant in an F.E.L.A. or Jones Act case. In that case the court said, '. . . The Act of 1908 and the amendment of 1939 . . . leave for practical pur-

poses only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury."

"In Rogers v. Missouri Pacific Railroad Company, U. S. Sup. 1957, 352 U.S. 500, 77 S.Ct. 443, the court in speaking of the inquiry which should be made in F.E.L.A. cases stated:

" 'The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit.' "

In reliance upon the above holdings, that court concluded:

"It is our view that even if the defense of unavoidable accident is available in F.E.L.A. and Jones Act cases predicated upon negligence, the issue on unavoidable accident was properly refused in the instant case because there is no evidence raising such issue. An unavoidable accident is one that occurs without having been proximately caused by the negligence of any party to the event. If the evidence does not raise the issue that something other than the negligence of a party to the event caused the injury, an issue on unavoidable accident should not be submitted. Dallas Railway & Terminal Co. v. Bailey, Tex. Sup. 1952, 250 S.W.2d 379; Hicks v. Brown, Tex. Sup. 1941, 151 S.W.2d 790; Hodges on Special Issue Submission in Texas, Sec. 19, p. 51."

While the cause was reversed on prejudicial error in submitting to the jury a definition of proximate cause in a F.E.L.A. case, the Fifth Circuit in *Page v. St. Louis S.W. Ry. Co.*, (1963), 312 F.2d 84, made the following statement:

> "We would agree that ordinarily in a case under this Act a charge on unavoidable accident is confusing and tends to distract the jury's attention from the simple issues of whether the carrier was negligent and whether that negligence was the cause, in whole or in part, of the plaintiff's injury. The charge may also have misplaced the burden of proof."

It is respectfully submitted Petitioner was denied a right of recovery under the FELA by virtue of the lower courts depriving him of his federally created rights as declared by this Court in *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed.2d 493; *Sinkler v. Missouri Pacific RR Co.*, 356 U.S. 326, 78 S.Ct. 758, 2 L.Ed.2d 799, reh. den'd. 356 U.S. 978, 78 S.Ct. 1133, 2 L.Ed.2d 1152, and the specific provision of Sec. 1 of the FELA making Respondent liable for defects and the insufficiency of the track in question. The issue of "unavoidable accident" as known to the Texas practice should not be a defense where it casts on Petitioner a greater burden than Petitioner is required to prove in pursuit of his federally created rights under the FELA. It is clear Petitioner was not accorded a fair trial or appellate review when the appellate court refused to pass on Petitioner's assignments of error. Heretofore, this Court has declared that local law and procedure cannot deprive rights conferred under the Federal law and the FELA. *Moundou v. New York N.H. & H.R. Co.*, (1912), 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327; *Arnold v. Panhandle & Santa Fe Railway Co.*, (1957), 353 U.S. 360, 77 S.Ct. 840, reh. den'd, 354 U.S. 926, 77 S.Ct. 1375 rev'g, 283 S.W.2d 203 (Tex.Civ.App.); *McAllister v. Magnolia Petroleum Company*, (1958), 78 S.Ct. 1201, rev'g, 297 S.W. 313 (Tex.Civ.App.).

It is respectfully submitted that the determination by this Court whether an affirmative defense of unavoidable accident as the substantive law of Texas allows such defense is a special and important reason for granting this writ of certiorari, and particularly, under Rule 19(1)(a), Rules of the Supreme Court of the United States, as amended, 28 U.S.C.A., as revised.

V. Was Petitioner deprived of a fair trial when counsel for Respondent repeatedly conducted a cross-examination in violation of the trial court's order sustaining Petitioner's motion in limine to suppress the fact that Petitioner had had other injuries and had filed a suit on such claim?

In *Sinkler v. Missouri Pacific Railroad Co.* (1958), 356 U.S. 326, 78 S.Ct. 758, 2 L.Ed.2d 799, reh. den'd. 356 U.S. 978, 78 S.Ct. 1133, 2 L.Ed.2d, 1152, and *Kernan v. American Dredging Co.* (1958), 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed.2d 382, we are told the industrial employer has a special responsibility towards his workers, who are daily exposed to the risks of the business and who are largely helpless to provide adequately for their own safety. The cost of human injury, an inescapable expense of railroading (and shipping), must be borne by someone. In the railroad and shipping industries, the FELA and Jones Act provide the framework for determining liability for industrial accidents. In the *Kernan* case, supra, it is said at 78 S.Ct. 398:

> "The FELA and the Jones Act impose upon the employer the duty of paying damages when injury to the worker is caused, in whole or in part, by the employer's fault. This fault may consist of a breach

of the duty of care, analogous but by no means identical to the general common-law duty, or of a breach of some statutory duty."

In the case at bar, Petitioner had the unfortunate experience of sustaining an injury while daily exposed to the risk of switching for RESPONDENT on November 8, 1952. At that time he sustained an injury to his back, ribs, intestines and stomach. The 1952 injury occurred while Petitioner was setting a brake on top of a box car at Respondent's depot tracks when the foreman kicked (meaning rolled by its own momentum) another car against the car on which Petitioner was working. Petitioner was knocked off the top of the end (box) car. Petitioner sued Respondent for damages by reason of the injuries sustained by him on November 8, 1952. He was under the treatment of Dr. McGehee. He wore a back brace for about a year and a half and missed about 60 days from work (S.F. 15, 21). He had recovered from the previous injury prior to the injury sustained by Petitioner on October 17, 1960. The case was called to trial in January of 1957, based on the 1952 injury, but did not go to final judgment in court, inasmuch as everything was *settled* (S.F. 103-04). Petitioner further testified to a minor injury to his knee in 1959, which did not require hospitalization (S.F. 22); in 1958 or 1959, he was involved in an automobile accident where someone struck his automobile in the rear, at which time an x-ray of his rib was made, but he lost no time from work (S.F. 22-4); he had something in his eyes when he went to the S. P. Hospital and Clinic (S.F. 22); about six months before he was knocked off of the platform of the engine on October 17, 1960, he had a minor sprain to his right knee when he stepped in a hole covered with weeds as he stepped off a rolling car, which

did not require any hospital treatment, but he did have it checked; the right knee was not bothering him before the fall in October, 1960 (S.F. 23); he had been to the S. P. Hospital and Clinic for treatment from time to time—ear stoppage, sinus and nervious stomach—had an x-ray when he hurt his rib in the early part of 1960 (S.F. 26). Before working for the Southern Pacific (same company as Respondent) he had never had any accidental injury; he was in good physical condition at the time of the accident (broken rail) on October 17, 1960, other than a nervous stomach (S.F. 27).

Prior to trial, counsel for Petitioner filed a motion in limine for an instruction from the trial court to counsel for Respondent not to go into or refer, among other things, to the fact Petitioner had any other claims for injuries or had filed suit or engaged counsel to represent him in connection with claims for injury or any settlement received (excluding the fact of other injuries). The trial court granted the motion, but counsel for Respondent was free to discuss the matter with the trial court before he took it up with the jury concerning the matters set out in the motion because they "may become admissible". (Appendix L, Tr. 6-7)

Aside from Petitioner's hip and abdomen hitting the steel plate, the principal injuries sustained by Petitioner in the occurrence of October 17, 1960, according to the undisputed evidence, were both of his knees. Both knees were bleeding immediately after Petitioner was knocked off the footboard when the rail section broke, and the engine derailed (S.F. Pltf. 71, 74, 76; W. B. Kyle, 349, 351; Everett S. Kyle, 397). He was taken to the Southern Pacific Hospital by assistant trainmaster Mr. Martin (S.F. 82). It was stipulated the Clinic (S. P. Hospital &

Clinic) records omitted to show therein that Petitioner reported to the Clinic on October 17, 28, and 31, 1960. Petitioner was treated by a bone specialist, Dr. Frank O. McGehee, which treatment was for both knee joints, beginning November 9, 1963. On July 20, 1961, an operation was performed on the left knee joint (S.F. 87, 184). The operation was performed on July 20, 1961, and Petitioner was off work for eight months following the operation, which was to March 14, 1962 (S.F. 88). The Kyle brothers testified to the fact that Petitioner was off work about eight months (S.F. 290, 351 and 410).

In this background, beginning with the cross-examination of Petitioner, counsel for Respondent made a studied and calculated trial tactic to prejudice Petitioner by reason of the back injury claimed by him in 1952 when he was knocked off of the top of a box car while working in Respondent's yards. In the course of the cross-examination of Petitioner, counsel inquired whether or not Petitioner had ever had a traumatic shock before, to which Petitioner answered he did in 1952; inquiry was made as to whether he had made a claim to the railroad in 1952 and claimed he had a severe traumatic shock which would last forever (S.F. 102) but which did not last forever; whether he claimed, in the accident of 1952, that he had sustained permanent and painful injuries and that he was never going to get over the back injury; and inquiry was made whether, when everything was settled, if Petitioner then got over it; inquiry was made whether he didn't get over it until after January of 1957; inquiry was made whether or not he did not give sworn testimony on oath in connection with that injury, like he had done in the present case in regard to the injury (knee injury) in Judge Snell's Court (S.F. 103-4).

Counsel for Petitioner objected on the grounds the cross-examination was in violation of the motion in limine (S.F. 104).

Out of the presence of the jury, counsel for Petitioner moved the Court, in view of the clear-cut violation by counsel for Respondent in referring to the testimony in Judge Snell's Court, of the motion in limine not to refer to anything in prior suits, cases, lawsuits or claims, and moved the trial court to declare a mistrial and discharge the jury because irreparable harm had been done and Petitioner could not receive a fair trial in view of such violation. The trial court inquired of opposing counsel whether he opposed the motion, at which time Mr. Miller made several remarks to the trial court about whether or not counsel for Petitioner was serious about the motion, and declared that if he was serious, he would join with him in the motion for a mistrial (S.F. 105). The trial court then overruled the motion for mistrial (S.F. 105-06).

Beginning with the *cross-examination* next morning, counsel for Respondent repeated the questions he had theretofore asked Petitioner in regard to the 1952 injury, and out of the presence of the jury, counsel for Respondent sought to introduce in evidence defendant's Exhibit No. 1, which was a certified photostat copy of a petition which was offered to show that plaintiff had a permanent injury to his back, to which counsel for Petitioner objected, and the trial court sustained the objection (S.F. 109-12). Petitioner was brought in for interrogation for the Bill of Exception. (S.F. 117).

Following the bill of exception, the jury was returned to the court room (S.F. 117). The first question directed to Petitioner was in regard to what they were talking

about when the court recessed the day before, which was the injury that he got in 1952. Counsel for Respondent then began writing on the blackboard what Petitioner's claim was in regard to the 1960 accident—he couldn't climb adequately; had mental anguish; had lost wages; had to do lighter work; tried to do highballing; claimed the men had been helping him; claimed loss of earning capacity; claimed he had trouble in walking; knees hurt; can't sit well (S.F. 117-119).

The cross-examination of Petitioner continued. In order for the Court to have available the type of cross-examination conducted by counsel for Respondent, of Petitioner and his doctor and witnesses, there is attached hereto as Appendix S, divided into five parts setting out excerpts from the cross-examination of Petitioner, as Appendix S-1, his witness Thomas M. Hairston as Appendix S-2, who on occasions worked with Petitioner as a member of a switching crew; Petitioner's doctor, Dr. Frank O. McGehee, as Appendix S-3, where counsel for Respondent popped his knee in front of the jury, but Dr. McGehee testified that was not what he was talking about (Hammons) (S.F. 232, page 30 of appendix S-3); and as Appendix S-4 and S-5, excerpts from the cross-examination of Walter B. Kyle and Everett S. Kyle, respectively, who were switchmen and members of the crew at the time Petitioner was injured on October 17, 1960.

The cross-examination went beyond permissible limits and propriety in the cross-examination of Petitioner and his witnesses concerning the 1952 injury and its effects and comparing the same with the claims Petitioner was making in regard to the 1960 injury. The conclusion is inescapable that Petitioner was deprived of a fair trial be-

fore the jury. Objections were made to some of the questions asked on cross-examination, which the trial court would sustain and, on other occasions, would overrule. Further objections by counsel for Petitioner would have been damaging to Petitioner because the jury would have thought Petitioner was trying to hide something from the jury which it was entitled to know. There was no rhyme or reason of justification for counsel for Respondent to circumvent the trial court's ruling that precluded the admission of Petitioner's petition based on the 1952 injury in an indirect manner by cross-examining Petitioner and his witnesses concerning each and every allegation contained in same and compairing it with the claims based on the 1960 injury. Respondent did not contend, in the case at bar, that Petitioner was guilty of any act of negligence on his part that brought about the derailment of the engine and the break in the rail. It is doubtful that any such claim was made by Respondent based on Petitioner's injury occurring in 1952, at a time when he was attending to his business as a switchman on top of a box car, when the box car was struck with such force that he was caused to be knocked off the top of the box car by another car over which Petitioner had no control.

The jury would have no knowledge of legal requirements of a pleading in a personal injury suit, and the sameness of many of the elements of damages that are required in law to be alleged are set forth a cause of action in a pleading. The trial tactics of counsel for Respondent obviously was to discredit Petitioner before the jury, as well as his witnesses, because he was so unfortunate as to have had an industrial injury in 1952, for which Respondent paid some money to him in settlement of his claim and suit but the amount was not made known to the jury. The in-

ference was left with the jury a large amount was paid and petitioned for for the 1952 injury. The obvious reason for such tactics was to reduce damages in the case at bar and to relieve Respondent of any liability. In this Respondent was successful, as evidenced by the findings of the jury, not only in respect to damages but liability but also the event was an unavoidable accident. The result, of course, is that Petitioner had a take-nothing judgment entered against him for the serious injuries he received on October 17, 1960.

It is respectfully submitted that the cross-examination of Petitioner and his witnesses and the manner same was conducted by counsel for Respondent was for an improper motive, which had the likelihood of misuse by the jury that out-weighed the value of such evidence. This Court should grant the writ of certiorari and reverse the judgment of the lower courts and grant to Petitioner a new trial. *Eichel v. New York Central R. R. Co.*, (1963), 375 U.S. 253, 84 Sup.Ct. 316, 11 Law Ed.2d 307. See also *Cross v. Houston Belt & Terminal Ry. Co.* (Houston, Tex.Civ.App. 1961, writ ref., n.r.e.), 351 S.W.2d 84, and *Burdick v. York Oil Company* (San Antonio, Tex.Civ. App. 1963, writ ref., n.r.e.), 364 S.W.2d 766, where there was prejudicial reversible error brought about by conduct of counsel for the defendant. This cause should be remanded for a new trial because such conduct precluded Petitioner from having a fair jury trial to which he was entitled.

CONCLUSION

It is respectfully submitted Petitioner has been deprived of a fair trial in the trial court and the opinion and decision of the Court of Civil Appeals for the Twelfth Supreme

Judicial District of Texas, failed to give the proper weight and probative value to the facts of the case. The result has deprived Petitioner of federally created rights under the FELA. Moreover, the facts did not raise the issue of unavoidable accident, and such defense should not be available under the FELA as such defense is applied under the Texas practice and procedure. The credibility of Petitioner and his witnesses were brought under attack to the disadvantage of Petitioner before the jury by reason of the prejudicial conduct of counsel for Respondent. Thus again Petitioner was denied a fair trial to which he was entitled under the Seventh Amendment of the U. S. Constitution.

For the foregoing reasons Petitioner urges that the Petition for Writ of Certiorari be granted for this Court to review the record and the opinion of the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, and reverse the judgments of the State courts and grant to Petitioner a new trial. Petitioner further prays for such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THE STATE OF TEXAS
COUNTY OF HARRIS

I, MABEL GREY HOWELL, one of the attorneys of record for the Petitioner E. F. Hammons, depose and say that on the 30th of June, 1965, I served duplicate copies of the foregoing Petition for Writ of Certiorari in the Supreme Court of the United States on Messrs. Baker, Botts, Shepherd & Coates and Richard Miller, Esq. and R. Gordon Gooch, Esq., at their present address, 1600 Esperson Building, Houston, Texas, by depositing same in a United States Post Office in the City of Houston, Texas, with first class postage prepaid. This affidavit is made by an attorney who is not a member of the bar of the Supreme Court of the United States, pursuant to Rule 33-1. and 3.(c), *Supreme Court Rules, as amended, 28 U.S. Code,* Rules of the Supreme Court.

MABEL GREY HOWELL

SUBSCRIBED AND SWORN TO before the undersigned authority, this 30th day of June, 1965.

/s/ MARGARET ROBERSON
Notary Public in and for
Harris County, Texas

APPENDIX "A"

E. F. HAMMON, Appellant
Case No. 52 v.
TEXAS & NEW ORLEANS RAILROAD COMPANY, Appellee

Appealed from the 157th Judicial District Court of Harris County, Texas

This is an action by E. F. Hammon, a brakeman, to recover damages under the Federal Employers Liability Act, 45 U.S.C.A., par. 51, et seq., by reason of a derailment of the switch engine on which he was riding while engaged in the performance of his duties as a brakeman. Upon the trial of the cause, the jury returned a verdict for the defendant. Based upon the verdict the court entered judgment in favor of the railroad company, to which plaintiff duly perfected this appeal.

The pertinent portion of the plaintiff's pleadings, alleging negligence on the part of the defendant was as follows:

"* * * On or about October 17, 1960, Plaintiff was employed as a switchman by the defendant and was acting within the course and scope of his employment for the defendant in Harris County, Texas, when he suffered severe bodily injuries. On such occasion, an old, worn out, defective track of the defendant gave way with the engine of the defendant which was operating thereon when a rail of such track broke resulting in the rail springing up and knocking with great force the plaintiff from the engine. Plaintiff was thrown to the ground and in so doing, struck both knees and legs forcibly against metal portions of the engine. Plaintiff suffered a severe traumatic shock and injuries hereinafter detailed. The occurrence made the

basis of this suit resulted from the negligence and carelessness of employees and representatives of the defendant, other than your plaintiff. Such negligence was a proximate cause of the occurrence made the basis of this suit and of the injuries and damages suffered by Plaintiff."

The defendant, by appropriate pleadings, denies these allegations and pleads unavoidable accident. In answer to the special issues submitted by the Court, the jury found (1) that defendant did not fail to "maintain" its track in such a manner as would have been done by a reasonably prudent railroad company in the exercise of ordinary care; (2) that the accident was unavoidable, and (3) that plaintiff suffered special damages in the amount of $1,261.00, and general damage in the amount of $5,000.00. No other issues were requested or submitted. The single objection to the charge leveled by the plaintiff was to the effect that there was no evidence to support the submission of the unavoidable accident issue.

Plaintiff now claims error on the part of the trial court in denying his motion for a new trial; in submitting an issue on unavoidable accident; in rulings on evidence and on the court's failure to declare one of the jurors disqualified. Each will more fully appear hereinafter.

Plaintiff produced testimony showing that on the occasion in question he was working as a member of the switching crew, which was in the process of "spotting" a loaded box car at a warehouse on what is known as the old Oriental Textile Industrial track in Harris County, Texas; that the engine being used was a diesel switch engine weighing approximately 232,000 pounds; that immediately before the derailment, the engine and the loaded car had passed over

the track and the car had been "spotted"; that as the engine was backing out of the industrial track, toward the main line, at a speed of about 6 to 8 miles per hour, he, together with a fellow employee, was riding on the front footboard on the front of the train, which was situated immediately above the rail; that the engine suddenly became derailed and rolled along across ties and then re-railed itself; that in the process, the rail under the footboard where plaintiff was standing broke in two places, causing the end of the rail to "kick up" and strike the footboard; that the impact knocked the footboard loose from the steel support, causing a portion of the footboard and the supports to strike him on the knees and abdomen; that he was knocked off the footboard, falling upon his knees upon the tracks; that he suffered an injury to both knees, causing them to bleed; that after being given first aid at the company hospital, he went home where he remained for two days before returning to work; that his knees and legs continued to bother him, and after returning to the company hospital for treatment on two other occasions, he employed Dr. F. O. McGee, some three weeks after the injury, who continued to treat him until July, 1961, at which time he operated upon plaintiff's left knee; that thereafter he was off from work for 8 months, after which he returned to his regular employment as a switchman in March, 1962, where he continued to work to the date of the trial.

According to the plaintiff, and three of the members of the switching crew, the section of the industrial track where the rail broke had been in a state of disrepair for the past fifteen years. They testified, in substance, that during that period of time none of the cross ties supporting the

rail had been replaced; that the ties were rotten and decayed; that a great number of the spikes holding the ties to the rail were missing; that there was no ballast around the ties to hold them in place; that the rail was a small rail, being what is known as a 60-pound rail and had been in use for many years; that it was rusty and worn, and that the track was rough and the train "wobbled" as it passed over the point where the rail broke.

Defendant called as its witness, Pat Neely, the road master in charge of the maintenance and repair of defendant's industrial tracks in the area. According to his testimony, this particular section of track in question had been out of service from about 1943 to 1955, because during the war years the railroad did not have any industries located along this section of the track that required switching services. In 1955, some five years before this accident made the basis of this suit, Neely testified that under Neely's supervision, this section of the track had been completely re-habilitated and had been placed in first class operating condition. The track was raised some three or four inches; the rails were checked for defects and approximately one-third of the cross ties were replaced; that the weight of the rail was 60 pounds to the yard; that this type of rail was in general use on industrial tracks, not only by defendant but by other railroads in the area. He testified that he and his assistant and the regular track inspector, made regular inspections of the company's industrial track and that the section of track in question was inspected once a week, for which a check was made for rotten ties, loose spikes, defective rails and ballasts, as well as being inspected for low places in the track by the use of a level, but that he had not found or had any

defect reported to him, and that the track was in good condition at the time of the derailment. He further testified that the breaking of rails was a common occurrence in the operation of a railroad and that a change in the weather was the most common cause, but that on some occasions a rail will break because of a defect in the metal. He further testified that the company used electronic equipment to search for defects and breaks in the rail on main lines, but that the use of such equipment was not practical on industrial tracks because of the dirt and debris.

One of plaintiff's witnesses, W. B. Kyle, testified that the condition of the track on the date of the trial was the same as that on the date of the derailment. J. W. Dukes, a track inspector for defendant, testified that while he was not the track inspector prior to the accident, that at the time of the trial, the track was in good condition.

There was no testimony describing the condition of the rail after the break except that the rail was broken in two places.

Plaintiff, in his first three points, contends that under the above factual situation, he has proved negligence as a matter of law and if not, then in the alternative he contends that there is no evidence to support the negative finding of the jury on Special Issue No. 1, or at least is insufficient evidence to support the finding.

The burden of proof was upon the plaintiff to establish negligence on the part of the defendant railway company by a preponderance of the evidence. This burden could have been discharged by obtaining a jury finding, supported by evidence of probative force or by undisputed evidence conclusively showing negligence. Having failed to obtain a jury finding of negligence, plaintiff now contends that

he established negligence as a matter of law. Under the facts presented in this record, we are not prepared to hold that the evidence showed defendant guilty of negligence as a matter of law, nor can we say that the verdict fails to find support in the evidence. To so hold would be to say that the defendant, as a matter of law, failed to use the care of an ordinary prudent railroad company in maintaining its track. It was undisputed that the train derailed and the rail was found to be broken. It was not shown, however, whether the broken rail caused the derailment or whether the derailment and the subsequent re-railment caused the break. Although it seems to be conceded that the break was a new break, there was no testimony linking the break to any defect in the rail itself. The switch engine, together with the car, had passed over the place of the break only moments before the derailment without incident. Hence, we think that the jury could have reasonably concluded that if there was a defect in the rail, same was such that it would not have been detected by a reasonable inspection and was not, therefore, under the circumstances, negligent in the maintenance of its track in failing to inspect for defects in the rail. The only other possible cause for the derailment and the breakage of the rail would be because of the fact that the rail was not properly supported by the ties, spikes and ballasts. Under the testimony, we think the jury could have concluded, as they did, that the defendant was not negligent in failing to properly maintain proper support for the rail. Though the evidence may have raised the issue of negligence, which we need not decide since the verdict was for the defendant, the jury was not compelled to accept the plaintiff's version of the condition of the track but was at liberty to accept the version of the defendant. Under these circumstances, we would

not be justified in holding that plaintiff established negligence by an undisputed preponderance of the evidence. Generally, the question of whether or not there is negligence is one of fact. It is only in the clearest cases, where the facts are undisputed, and are such that reasonable minds can draw but one inference or conclusion therefrom, that a court is justified in finding the existence of negligence as a matter of law. Fort Worth & D. Ry. Co. v. Barlow, Tex. Civ. App., 263 S.W.2d 278; Houston Belt and Terminal Company v. Chance, Tex. Civ. App., 332 S.W.2d 430. The evidence did not show any alleged violation of law by Defendant's employees proximately causing the accident. The evidence did not establish negligence as a matter of law by showing a total lack of care on the part of defendant or its employees. On the contrary, the evidence viewed in its most favorable light to defendant as required in such cases, shows the existence of some care by defendant and its employees. The question of whether that care was reasonable or due care under the circumstances was one of fact for the jury. Rio Grande, E.P. & S.F.R. Co. v. Dupree, Tex. Comm. App., 55 S.W.2d 522; Texas & N.O.R. Co. v. Blake, Tex. Civ. App., 175 S.W. 2d 683; Cole v. Missouri-Kansas-Texas R. Co. of Texas, Tex. Civ. App., 179 S.W.2d 343; Mosby v. Texas & P. Ry. Co., Tex. Civ. App., 191 S.W.2d 55; Henwood v. Gilliam, Tex. Civ. App., 207 S.W.2d 904; Adkins v. Texas & P. Ry. Co., Tex. Civ. App., 233 S.W.2d 956; Houston Belt and Terminal Company v. Chance, supra; Conser v. Atchison, T.&S.F. Ry. Co., 266 S.W.2d 587, Sup. Ct. Mo. The effect of the jury's verdict is to say that in so far as plaintiff was concerned, the defendant discharged its duty of exercising due care in the maintenance

of its track. To hold defendant responsible to a greater degree of care would be to impose liability without fault.

> "The act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of this liability is his negligence, not the fact that injuries occur."

Ellis v. Union Pacific Ry. Co., 329 U.S. 649, 653, 67 S.Ct. 598, 600.

Plaintiff contends under point four that the judgment should be reversed because the negative answer of the jury to special issue No. 1, finding no negligence, is so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and unjust.

Ordinarily, this assignment requires the Courts of Civil Appeals of this state to sift and re-weigh all of the testimony in the record, both that supporting the verdict, along with the other evidence in the case, including that which is contrary to the verdict, and then to determine, whether as a matter of fact, the verdict and judgment of the court is so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and unjust. In Re King's Estate, 150 Tex. 662, 244 S.W.2d 660. However, in view of the holding in Deen v. Hickman, 353 U.S. 925, 77 S.Ct. 715, reversing the Supreme Court of Texas in Gulf, Colorado & Santa Fe Railway Company v. Deen, 158 Tex. 466, 312 S.W.2d 933, holding that the Texas Supreme Court was in error in reversing the cause to the Court of Civil Appeals for a determination of the question of whether the verdict of the jury was so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and unjust, we express

some doubt as to whether this court has any authority to re-weigh the evidence and then substitute our judgment in place of that of the jury. As was demonstrated there, such procedure would no doubt be prohibited in a case where a recovery had been allowed a plaintiff. Ellis v. Union Pacific Ry. Co., supra; Rogers v. Missouri Pacific Ry. Co., 352 U.S. 500; 77 S.Ct. 443. If this be true, then we can perceive of no just and valid reason why the same rule should not also be applied in a case where the verdict has been rendered for the defendant. This view would seem to find support in the holding of the court in Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, where in the court held that factual issues cannot be relitigated by the reviewing courts, stating that it is "only when there is a complete absence of probative facts to support the conclusion reached (jury) does reversible error appear."

Suffice it to say, however, we have examined the entire statement of facts consisting of 589 pages and find that we are unable to say as a matter of fact that the verdict of the jury is so contrary to the overwhelming weight and preponderance of the evidence as to be manifestly wrong and unjust.

Points five through eight complain of the action of the trial court in submitting Special Issue No. 3, inquiring as to whether or not the occurrence in question was the result of an unavoidable accident. Plaintiff takes the position that there is no evidence, or at least insufficient evidence, to raise the issue, and further that the verdict finding the accident to be unavoidable is contrary to the overwhelming weight and preponderance of the evidence.

He further contends that since such an issue is not a controlling issue under the Federal Employers Liability Act, the mere submission of the issue was prejudicial.

No objection was made in the trial court on the ground of the prejudicial effect of the submission of the issue.

In view of the failure of the jury to find any primary negligence on the part of the Defendant, we are of the opinion that the submission of the unavoidable accident issue, or any alleged error with respect thereto, becomes immaterial. Brown v. Dallas Gas. Co., Tex. Civ. App., 42 S.W.2d 869, writ ref.; Smith v. Morgan, Tex. Civ. App., 235 S.W.2d 938 Adkins v. Texas & Pac. Ry. Co., supra; Blanton v. E & L Transport Co., 146 Tex. 377, 207 S.W.2d 368. In a situation where the plaintiff has failed to discharge his burden of establishing his cause of action by failing to prove any act of primary negligence, the submission of other issues would be harmless. Rule 434, T.R.C.P.; Neal v. Lykes Bros. Steamship Co., 306 F.2d 313. Quinterno v. Sinclair Refining Co., 311 F.2d 217; Brown & Root v. Haddad, 142 Tex. 624, 180 S.W.2d 339, 342.

Point nine complains of the action of the trial court in failing to declare a mistrial grounded upon the violation by defense counsel of a motion in limine requiring him to refer to or make mention of the fact that plaintiff had had a prior suit for personal injuries or a claim therefor.

Points ten and eleven assert error of the trial court in failing to grant plaintiff a new trial because of the alleged error of the court in not excluding evidence of the prior injury and the claim based thereon.

In granting the motion in limine, the court ruled that Defendant was not to elicit testimony showing plaintiff had made other claims for injuries or had filed any suits for injuries or engaged attorneys to represent him in connection therewith, or had received any settlements unless he had first discussed the matter with the court. On direct examination of the plaintiff by his attorney, it was brought out that in November, 1952, plaintiff had been seriously injured in an accident while working for defendant, as a result of having been knocked from the top of a car. Plaintiff testified that he received injuries to his back and ribs on the left side and had developed stomach trouble; that he suffered pain with these injuries for about four years, but that all of his previous injuries had healed except for the stomach condition which still bothered him. He testified he had been told that his previous injuries were going to be permanent. He also testified that approximately six months before the receipt of the present injury, he had sprained his right leg and knee, by stepping in a hole while employed as a switchman for the defendant, but that within a few days it had healed.

Upon cross examination, without objection, plaintiff admitted that he had claimed in the 1952 accident that he had sustained permanent injuries, and that he would never recover from the back injury, but that he had gotten over the injury but did not know the date. He was then asked as to whether he had given sworn testimony in that case in Judge Snell's Court. At this point counsel for the plaintiff objected to the violation of the motion and order in limine and moved for a mistrial. The court overruled the motion.

Eliciting testimony from the plaintiff that he had testified in court in connection with his 1952 injury, was no doubt a violation of the order of the court. The effect of such testimony was to show that the plaintiff had actually made a claim upon the previous injury and had filed a suit in court thereon. Counsel for the plaintiff did not, however, request the court to instruct the jury not to consider the testimony, but took the position then, that he does now, that the harmful effect of the testimony was such that it so prejudiced the jury that he should have been granted a mistrial. He contends that the harm was demonstrated by the fact that the jury failed to find in his favor on the issue of primary negligence and awarded what he considers to be an inadequate amount of damages. The fact that the jury did award some damages, would seem to indicate that even though the jury was informed that he had testified in court in regard to his 1952 injury, there was no prejudice on the part of the jury. If there had been prejudice, we think the jury would have more likely awarded no damages.

Liability in this case was predicated upon the proposition of whether or not defendant failed to use ordinary care in maintaining its track. In order to say that the conduct of counsel in eliciting this testimony before the jury, showing that he had had a prior lawsuit, probably caused the rendition of an improper judgment, we would first be compelled to conclude from a review of the record that but for the conduct and the testimony elicited, the jury would probably have answered the issue in such fashion as to impose liability on the defendant. We are not prepared to so hold. The deliberations of the jury in attempting to decide as to whether or not the defendant failed

to use due care in maintaing its track would not, in our opinion, be affected by the fact that the plaintiff had testified in court on a previous claim. It is not enough to say that this testimony might have possibly caused the jury to have answered the issue contrary to his contention. Aultman v. Dallas Ry. & Term. Co., 152 Tex. 509, 260 S.W.2d 596, 600; Condra Funeral Home v. Rollin, 158 Tex. 478, 314 S.W.2d 277, Rule 434, T.R.C.P.

By points ten and eleven, complaint is made to numerous other questions propounded to plaintiff by counsel for defendant concerning his 1952 injuries and what he claimed in connection therewith. Most of the questions and answers thereto went into the record without objection. In the presentation of these points, counsel does not refer to pages of the transcript where the supporting assignments may be found; nor are the "series of questions", which are claimed prejudicial and harmful, brought forward in the brief. We think this fails to comply with Texas Rules of Civil Procedure, Rule 418(c), and would prevent our considering any error in connection therewith. Moreover, we think that if the interrogation of the plaintiff in connection with his previous claim had been so prejudicial as now complained of, counsel should, in addition to making a timely objection, have again moved for a mistrial; absent which, the error, if any was waived. Safety Cas. Co. v. Bennett, Tex. Civ. App., 259 S.W.2d 596.

Plaintiff contends by his twelfth point that the trial court erred in refusing to grant a new trial for the reason that the answer by the jury in Special Issue No. 5 in assessing $5,000.00 was so inadequate for the bodily injuries

sustained by the plaintiff that the answer is so contrary to and against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. As pointed out hereinabove, since the jury failed to find any act of primary negligence which would impose liability upon the defendant, we believe the jury's answer to the damage issue becomes immaterial, and therefore, any discussion thereon would be purely academic. Shell Oil Co. v. Dennison, Tex. Civ. App., 132 S.W.2d 609; Garza v. San Antonio, Tex. Civ. App., 180 S.W.2d 1006.

Point thirteen complains of the action of the court in overruling Plaintiff's challenge for cause upon one of the prospective jurors, thus forcing plaintiff to take an objectionable juror. The question propounded the juror by plaintiff's counsel was whether or not the juror's experience in investigating accidents on behalf of the company he worked for might operate to the detriment and prejudice of plaintiff, to which the juror answered in the affirmative. As we read this juror's testimony, he testified that the only reason that he said that his previous experience might operate to the detriment and prejudice of the plaintiff was because he felt that if there was any question raised as to his fairness, he wanted to disqualify himself. Upon being questioned by the court, he stated that was the reason he gave such an answer, and then affirmatively assured the court that his previous experience would not in any way affect his ability to be completely fair and impartial. A review of the jurors testimony compels us to conclude that a question of fact was presented to the trial court as to whether or not the juror could be said to have been biased or prejudiced. Although the juror

testified that his previous experience "might" have some effect upon his verdict, he never at any time said it "would" affect his verdict. McBroom v. Brown, Tex. Civ. App., 277 S.W.2d 310; The Swap Shop v. Fortune, —— Tex. ——, 365 S.W.2d 151.

Furthermore, we think the error, if any, was harmless. No objection was made to any other juror during the trial and the challenged juror did not serve. After an adverse verdict, upon the hearing for a new trial, plaintiff for the first time made it known that one of the jurors who served at the trial was in fact objectionable. We think that in order to complain, plaintiff would be required to show that prior to the exercise of his preemptory challenges, he apprized the trial court that one of the jurors was obnoxious to him and that he would have challenged that juror had he not been forced to exhaust a challenge on an objectionable juror. Galveston, H.&S.A. Ry Co. v. Keesey, Tex. Civ. App., 110 S.W. 170; Kansas City, M.&O. Ry. Co. of Texas v. Weaver, Tex. Civ. App., 591.

The judgment of the trial court is affirmed.

JAMES H. MOORE
Associate Justice

July 16, 1964
Filed July 16, 1964

APPENDIX "B"

BE IT REMEMBERED:

THAT the Honorable Court of Civil Appeals for the Twelfth Supreme Judicial District of the State of Texas, present Chief Justice Otis T. Dunagan, and Associate Justices James H. Moore and Grover Seller, in Cause

E. F. HAMMONS, Appellant
Case No. 52 v.
TEXAS & NEW ORLEANS
RAILROAD COMPANY,
Appellee

Trial Court No. 575,791 on July 16, 1964, entered the following judgment:

THIS CAUSE having been transferred to this Court from the Court of Civil Appeals for the First Supreme Judicial District of Texas by Order of the Supreme Court, and coming on to be heard on the transcript of the Record, and the same being inspected, it is the opinion of the Court that there was no error in the judgment.

It is therefore CONSIDERED, ADJUDGED and ORDERED that the judgment of the Court below be in all things affirmed; that the appellee, Texas & New Orleans Railroad Company, recover of and from the appellant, E. F. Hammons, and from Lawyers Surety Corporation, surety upon appellant's appeal bond, all costs in this behalf expended, both in this Court and the Court below, for all of which execution may issue; and that this decision be certified to the Court below for observance.

APPENDIX "C"

Motion Docket No. 146:

September 24, 1964

ORDER

Appellant's Motion for Rehearing.

Motion is submitted and overruled.

APPENDIX "D"

Motion Docket No. 150:

ORDER

September 24, 1964

THIS DAY came on to be heard Appellant's Motion to Amend its Brief heretofore filed herein. The Court having duly considered said motion is of the opinion same should be overruled, and it is adjudged and ordered that the same be and is hereby overruled.

APPENDIX D-1

Motion Docket No. 288:

ORDER

May 20, 1965

THIS DAY came on to be heard Appellant's Motion to Stay Enforcement of Judgment for Costs Pending Application for a Writ of Certiorari to the Supreme Court of

the United States; and the same being considered, it is the opinion of the Court that the motion should be granted.

It is therefore ORDERED, ADJUDGED and DECREED that the enforcement of the judgment for costs in Cause No. 575,791, District Court of Harris County, against the appellant, E. F. Hammons, by the Honorable R. J. Lindley, District Clerk of Harris County, Texas, be stayed pending the time allowed for filing of a Petition for Writ of Certiorari to the Supreme Court of the United States and the final disposition thereof.

APPENDIX "E"

IN THE SUPREME COURT OF TEXAS

March 17, 1965

No. A-10,436

E. F. HAMMONS

v.

Texas & New Orleans Railroad Company

From Harris County, Twelfth District

Application of petitioner for writ of error to the Court of Civil Appeals for the Twelfth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, E. F. Hammons, and surety, Lawyers Surety Corporation, pay all costs incurred on this application.

APPENDIX "F"

IN THE SUPREME COURT OF TEXAS

April 7, 1965

No. A-10,436

E. F. HAMMONS
v.
Texas & New Orleans Railroad Company
From Harris County, Twelfth District

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

APPENDIX "G"

No. 575,791

E. F. HAMMONS
v.
Texas & New Orleans Railroad Company

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
113TH JUDICIAL DISTRICT

JUDGMENT

BE IT REMEMBERED that on the 22nd day of May, 1963, at a regular term of this Court, came on to be heard the above entitled and numbered cause, and came E. F. Hammons, plaintiff, in person and by and through his

attorney of record, and came Texas and New Orleans Railroad Company, defendant, by and through its attorney of Record, and all parties announced ready for trial, Thereupon, a jury, consisting of Albert W. High, and eleven (11) other good, true and lawful men and women were duly empaneled, selected, and sworn, and the trial of the case proceeded with the reading of the pleadings and the introduction of evidence. The trial of said cause having proceeded from day to day until the 27th day of May, 1963, the cause was submitted to the jury by the Court on the following special issues, and the jury, after having been duly charged by the Court, retired, and having duly deliberated returned, on the 28th day of May, 1963, as their verdict the following answers to the special issues:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that before the occurrence made the basis of this suit the Defendant Railroad Company failed to maintain the track in question in such manner as would have been done by a reasonably prudent railroad company in the exercise of ordinary care under the same or similar circumstances?

Answer: "We do" or "We do not."

To Which The Jury Answered: "We do not."

If you have answered Special Issue No. 1 "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that such failure, if any, was a proximate cause of the occurrence made the basis of this suit?

Answer: "We do" or "We do not."

To Which The Jury Answered: Not answered.

* * * * *

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that the occurrence in question was not the result of an unavoidable accident?

Answer: "It was not the result of an unavoidable accident," or "It was the result of an unavoidable accident."

To Which The Jury Answered: "It was the result of an unavoidable accident."

By the term "unavoidable accident" is meant an accident which is not proximately caused by the negligence of either the defendant or the plaintiff.

* * * * *

SPECIAL ISSUE NO. 4

What sum of money, if any, do you find from a preponderance of the evidence will compensate the plaintiff, E. F. Hammons for such reasonable medical expenses, if any, which were incurred and were reasonably necessary as a direct result of the occurrence made the basis of this suit from October 17, 1960, to the date of this trial?

Answer by stating the amount, if any, in dollars and cents.

To Which The Jury Answered: $1261.60.

* * * * *

SPECIAL ISSUE NO. 5

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence

would fairly and reasonably compensate the plaintiff, E. F. Hammons, for such injuries and damages, if any, as were directly and proximately caused and will in reasonable probability be directly and proximately caused in the future by reason of the occurrence made the basis of this suit, taking into account such of the following elements which you find are established by a preponderance of the evidence and none other:

(a) Such physical pain, if any, as you find from a preponderance of the evidence the plaintiff, E. F. Hammons, has sustained from October 17, 1960, to the date of this trial, directly resulting from the injuries, if any, suffered from the occurrence made the basis of this suit;

(b) Such mental anguish, if any, as you find from a preponderance of the evidence the plaintiff, E. F. Hammons, has sustained from October 17, 1960, to the date of this trial, directly resulting from the injuries, if any, suffered from the occurrence made the basis of this suit;

(c) Such physical pain, if any, as you find from a preponderance of the evidence plaintiff, E. F. Hammons will in reasonably probability suffer in the future beyond this date directly resulting from the injuries, if any, suffered from the occurrence made the basis of this suit;

(d) Such mental anguish, if any, as you find from a preponderance of the evidence plaintiff, E. F. Hammons will in reasonable probability suffer in the future beyond this date directly resulting from the injuries, if any, suffered from the occurrence made the basis of this suit;

(e) Such loss of earnings, if any, as you find from a preponderance of the evidence plaintiff, E. F. Hammons has sustained since October 17, 1960, to

the date of this trial, directly resulting from the injuries, if any, suffered from the occurrence made the basis of this suit;

(f) The reasonable present cash value of such loss of earning capacity of plaintiff, E. F. Hammons, as you find from a preponderance of the evidence he will in reasonable probability sustain in the future beyond this date, directly resulting from the injuries, if any, suffered from the occurrence made the basis of this suit.

Answer by stating the amount in dollars and cents, if any.

To Which The Jury Answered: $5,000.00.

(Signed) Albert W. High
Foreman

And the Court having duly received such verdict, and having ordered the same filed, without objection from either party, and the Court having considered the verdict of the jury and being of the opinion that the judgment should be entered against the plaintiff, E. F. Hammons, and in favor of the defendant, Texas and New Orleans Railroad Company, and the defendant having moved for judgment, it is accordingly,

ORDERED, ADJUDGED AND DECREED BY THE COURT that the plaintiff, E. F. Hammons, take nothing as against the defendant, Texas and New Orleans Railroad Company, and that as to all claims and causes of action asserted against it, the defendant go hence without day. It is further

ORDERED, ADJUDGED AND DECREED BY THE COURT that all costs of court incurred herein be charged against the plaintiff, E. F. Hammons.

To all of which the plaintiff in open court duly and timely excepted.

SIGNED and ENTERED this 10th day of June, 1963.

/s/ PHIL PEDEN
Judge

Approved As To Form:

RAYMOND L. McDERMOTT
Attorney for Plaintiff

BAKER, BOTTS, SHEPHERD & COATES

By /s/ RICHARD B. MILLER
Richard B. Miller
Attorneys for Defendant

APPENDIX "H"

STATE COURTS; APPEAL; CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority, exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929; 28 U. S. Code, Sec. 1257.

APPENDIX "I"

FEDERAL EMPLOYERS' LIABILITY ACT

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 51.

APPENDIX "J"

AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law. (U. S. Const.)

APPENDIX "K"

NO. 575,791

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
157TH JUDICIAL DISTRICT

E. F. HAMMONS
v.
TEXAS & NEW ORLEANS RAILROAD COMPANY

PLAINTIFF E. F. HAMMONS' EXCEPTIONS AND OBJECTIONS TO THE CHARGE OF THE COURT

Comes now plaintiff, E. F. Hammons, and prior to the submission of this case to the jury or the reading of the charge, makes these, his objections and exceptions to the Court's charge in writing:

I.

Plaintiff objects and excepts to special issue No. 3 as contained in the Court's charge, being the issue on unavoidable accident, for each and all of the following reasons:

1. There is no evidence to support the submission of such issue;

2. The evidence is insufficient to support the submission of such issue;

3. An affirmative answer to such issue would be against the great weight and overwhelming preponderance of the evidence in this case.

Wherefore, premises considered, plaintiff prays that these objections be sustained collectively and separately.

Respectfully submitted,

RAYMOND L. McDERMOTT
Raymond L. McDermott
Attorney for Plaintiff

ORDER OF THE COURT

The foregoing exceptions to the charge having been presented to me in writing, prior to the submission of this cause to the jury or the reading of the charge to the jury, and having been duly considered by me, they are, each, overruled and denied, to which action of the court plaintiff in open court excepted and objected.

/s/ PHIL PEDEN
District Judge

APPENDIX "L"

NO. 575,791

E. F. HAMMONS v. TEXAS & NEW ORLEANS RAILROAD COMPANY	In The District Court of Harris County, Texas 157th Judicial District

PLAINTIFF'S MOTION IN LIMINE

Comes now the plaintiff, E. F. Hammons, prior to the voir dire examination, and makes this, his motion to the Court requesting that counsel for the defendant be instructed not to go into or refer to any of the following matters in the hearing of the jury, and to instruct each witness that he places on the witness stand not to mention same in the hearing of the jury without first having approached the bench out of the hearing of the jury and obtained permission of the Court to go into such matters; that the matters here referred to are immaterial, prejudicial, and any reference to them in front of the jury would cause incalculable harm and incalculable error, which is why this motion is made to the Court in advance of the trial.

The matters so referred to are:

I.

The fact that the plaintiff has at any time received any sick benefits from the railroad Retirement Board or is or may be eligible for any disability pension or retirement pension or any other type of retirement or pension benefits either because of old age or because of disability now or in the future.

II.

The fact that plaintiff has made any other claims for injuries or filed any suits for injury or engaged any attorneys to represent him in connection with claims for injury or received any settlement. In this connection, plaintiff does not mean by the motion to rule out the fact of other injuries, but simply the fact of making a claim or filing a suit or hiring a lawyer or receiving a settlement.

III.

The fact that plaintiff had or does have any other insurance that paid him any other benefits on account of his disability resulting from this accident or was eligible to or did receive any insurance benefits on account of lost time or disability resulting from this accident.

Respectfully submitted,

RAYMOND L. McDERMOTT
Raymond L. McDermott
Attorney for Plaintiff

ORDER

THE Court: I grant the motion, but it is my position that counsel for defendant is free to discuss, before he takes it up with the jury, any of the matters in here because they may become admissible.

/s/ PHIL PEDEN
District Judge

APPENDIX "M"

THE STATE OF TEXAS §
COUNTY OF HARRIS §

BEFORE ME, the undersigned Notary Public, personally appeared Roscoe L. Poarch and stated to me, under oath, as follows:

My name is Roscoe L. Poarch and I live at Box 65, Spring, Texas. I am retired from the Southern Pacific after 26½ years.

I have been asked to give my sworn testimony about the Old Orental Textile Lead on the S P lines in Houston, Texas. I understand that this information is sought in connection with a lawsuit filed involving this lead.

I was personally responsible for the Old Orental Textile Lead in on job or another from 1935 until 1957, with the exception of about 7 months in 1956. From 1935 to 1946 I was the Extra Gang Foreman who personally supervised the gangs who did the actual work on that Lead. In 1946, I was promoted to Assistant Roadmaster and was still responsible for all the work on the Old Orental Textile Lead under Pat Neely.

About the time that World War II started, the switch into the Old Orental Textile Lead was spiked. Around 1949, even the main line along Nicholson Street before you get to the Old Orental Textile Lead was barricaded in order that the city could build the pumping station there and put lines under our tracks.

Starting in about 1950, we began rehabilitation of the Old Orental Textile Lead. This rehabilitation was completed in the latter part of 1952 or the early part of 1953. The switch was unspiked at that time.

I personally supervised this rehabilitation. We reworked the roadbed and raised it about 2″ on the average. We replaced every rail in the Old Orental Textile Lead with 75 and 80 pound rail. We replaced every bad tie, which I remember to be over 200.

I have been asked to explain how we tested for bad ties. First, I personally walked the whole lead with a pick, striking each tie. Second, we jacked up every rail length, ties and all. (any rotten ties will fall off when the track is raised) Third, when we pulled all the spikes to replace the rail, we threw away any tie which did not hold the spike tight.

After this rehabilitation this Old Oriental Textile Lead continued to be my responsibility, and I inspected it regularly until I retired. The lead was in good condition.

ROSCOE L. POARCH

SUBSCRIBED AND SWORN BEFORE ME, this the 7th day of August, 1963.

ARTIE JANE BEDFORD
Notary Public in and for
Harris County, Texas

APPENDIX "N"

Case No. 575,791

E. F. HAMMONS v. TEXAS & NEW ORLEANS RAILROAD COMPANY — IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 157th JUDICIAL DISTRICT

PLAINTIFF'S AMENDED MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now E. F. Hammons, plaintiff in the above case, and makes this his amended motion for a new trial, leave of court being had, praying that the verdict received in this cause on May 28, 1963, and the judgment entered in this cause on June 10, 1963, be set aside and held for naught and that a new trial be granted herein. As grounds for such amended motion plaintiff respectfully shows as follows:

I.

There is no evidence to support the negative finding of the jury in answer to Special Issue No. 1.

II.

The negative answer of the jury in answer to Special Issue No. 1 is insufficiently supported by evidence.

III.

As a matter of law, the negative answer of the jury to Special Issue No. 1 is wrong and erroneous, in that the Federal Employers Liability Act expressly makes the de-

fendant liable for injuries caused by defects in its tracks, as was shown herein without dispute in the evidence. By the assignment, plaintiff raises a Federal question under said Act. Under the undisputed evidence in this case the occurrence made the basis of this suit and plaintiff's injury were proximately caused through negligence of the defendant, its agents and employees, in failing to properly maintain the track upon which the plaintiff's accident occurred; and in permitting the track to remain in defective condition with rotten cross ties.

IV.

The negative answer of the jury to Special Issue No. 1 is against the great and overwhelming preponderance of the evidence.

V.

The answer of the jury to Special Issue No. 3 has no evidence in the record to support same.

VI.

The answer of the jury to Special Issue No. 3 is insufficiently supported by evidence.

VII.

The answer of the jury to Special Issue No. 3 is against the great weight and overwhelming preponderance of the evidence.

VIII.

The answer of the jury to Special Issue No. 5 assessing only Five Thousand Dollars ($5,000.00) in damages is so

against the great weight and overwhelming preponderance of the evidence as to establish that the jury in this cause was prejudiced and biased against the plaintiff.

IX.

The Court erred in refusing to sustain the challenge for cause to the juror John M. McMakin who admitted under questioning by plaintiff's counsel that he would not be impartial in a case of this sort, as reflected by the proceedings on voir dire examination of the jury. As a result of the Court's failure to sustain the challenge for cause, plaintiff was required to strike this juror using a preemptory strike upon him, and thereby depriving plaintiff of his right to six (6) preemptory challenges. As a result plaintiff was forced to take an objectionable juror on the jury. The verdict of the jury, which is contrary to the evidence in this case, shows that the jury was motivated by bias and prejudice and clearly establishes the harm done to plaintiff by depriving him of his full, six preemptory challenges.

X.

The Court erred in submitting Special Issue No. 3, on unavoidable accident, in that this was not an ultimate or controlling issue in this case, under the Federal Employers Liability Act. Such issue should not have been submitted in that it merely gave defendant an undue advantage by emphasizing defendant's theory of the case, and submitted merely the converse of primary negligence issues. By this assignment plaintiff raises a Federal question under the Federal Employers Liability Act.

XI.

The Court erred in overruling and denying plaintiffs' motion for mistrial, based upon the violation by defense counsel of the motion in limine requiring him not to refer to or make mention of the fact that plaintiff has had a prior suit for personal injuries, or a claim therefor. When defense counsel brought out in his questioning of plaintiff that testimony in connection with plaintiff's previous personal injury was given by plaintiff in Judge Snell's Court, he clearly violated such motion and order of the Court on the motion in limine, to the prejudice and harm of plaintiff. The Court erred in not granting plaintiff's motion for mistrial made at that time, when counsel for defendant first violated the Court's order on the motion in limine. The Court further erred at that time in not sustaining plaintiff's objection to such evidence, and in overruling plaintiff's further motion for suppression of evidence, made at this point. Thereafter there ensued repeated violations by defense counsel who merely compounded the error already committed. In face of the motion in limine, and order thereon, defense counsel continually referred to a claim or suit by plaintiff prior to the one on trial. The verdict of the jury herein, contrary to the evidence on liability and damages, clearly demonstrates the irreparable harm which occurred to plaintiff as a result, for the reason that counsel for the defendant not only violated the motion in limine during the trial of the case by referring to a prior suit and claim of plaintiff, but also did so in his arguments to the jury. The remarks by counsel could not have been cured by any objection and were in violation of the order already entered by the Court prohibiting him from doing same and further ob-

jection would have been useless and to no avail in that the prejudice done could not have been erased. The entire conduct of counsel for the defendant in repeatedly referring during the trial and argument to such prior suit and claim of plaintiff had its cumulative effect and deprived plaintiff of a fair trial.

XII.

The Court should grant a new trial herein for the reason that defendant's counsel, repeatedly during the trial and in argument violated the Court's order on the motion in limine, excluding any reference to a prior claim or suit by plaintiff for personal injury. Such repeated violations constituted reversible error and prejudice, by cumulative effect.

XIII.

The Court should grant a new trial herein for the reason that plaintiff has newly discovered evidence of a material nature that would in all reasonable probability change the result of the jury verdict rendered herein. In this connection it is shown unto the Court that on the last day of defendant's evidence during the trial of this case and within two to three hours of the time that both sides rested their respective cases on the merits, the defendant produced as a witness on the stand Mr. Pat Neely, roadmaster of the defendant in Houston, Texas. Pat Neely testified, as a complete surprise to plaintiff herein, that the Oriental Textile Lead, the track upon which plaintiff was injured, was closed or "spiked" from 1943 to 1955; that during such time the track was closed because the Oriental Textile Mill, located at one end of this Lead and

which said Lead servieed, moved out during the war; that no trains or cars traveled over such track from the period of 1943 to 1955; and then in 1955 the track was reopened at which time it was renewed or rehabilitated. Mr. Neely testified that in the year 1955 about 250 ties were replaced, that is about one third of the ties in this stretch of track were renewed or replaced; that the track was inspected, raised, and put in good operating condition; that all rails were inspected and that in 1955 when such renewing or rehabilitation of the track was done it was placed in good working order. Such testimony was untrue and incorrect. The testimony came as a complete surprise to the plaintiff at the end of the trial in that he had no reason to anticipate that the defendant railroad company would ever contend that this track was closed for a period of approximately twelve years and that following such closing of the track it was completely renewed and rehabilitated thereafter which rehabilitation allegedly occurred according to the witness, Pat Neely, approximately five years before plaintiff's injury. This testimony was highly material, prejudicial and harmful to plaintiff in that it conveyed the idea to the jury that this track had been placed in first class or excellent operating condition by completely renewing old, rotten ties in it and replacing them, some five years prior to plaintiff's injury. Had the jury known that such evidence was false and incorrect in all likelihood it would have reached a contrary result and answered Special Issue No. 1 to the effect that the track had not been maintained in a proper condition prior to plaintiff's accidental injury. Plaintiff had no reason to suspect that such evidence would be given or offered and even after it was offered was in no position to rebut it during the trial of the case. Immediately following the trial of this

case plaintiff through his representatives and attorney began an intensive search to determine whether or not such evidence was correct or not. After extensive search and investigation lasting over a month, plaintiff with all due diligence had now uncovered evidence by witnesses that establishes the falsity of such testimony by Pat Neely. In this connection it is shown that either Mr. Pat Neely has a poor memory or has confused the track in question with some other track. In any event the track known as the Oriental Lead upon which plaintiff was injured was not closed from the years 1943 to 1955 nor any time comparable to that; it was in use during all of those years from 1943 to 1955 and the Oriental Textile Mill was in operation during such period of time and making regular use of the track for its shipments in and out; no rehabilitation or renewal of the track was ever made during the year 1955 or thereabouts; and the track remained in the same condition in the years 1943 to the date of plaintiffs' accident in 1960 without any major repairs, or renewal or rehabilitation. Specifically the track was never closed down for a period of several years and then opened and renewed. Such facts herein alleged can be and will be established upon hearing of this motion by the following witnesses whose addresses are shown:

(1) Beatrice V. Locke, 2235 Marnel Street, Houston.

(2) George F. Goebel, 449 W. 23rd Street, Houston.

(3) Archie Baker, 6201 Jim Street, Houston, Texas.

The witnesses Beatrice V. Locke and George F. Goebel will testify in accordance with their affidavits attached hereto and made part of this motion for new trial. The witness, Archie W. Baker, being a retired yard master of the defendant, did not want to give a signed statement, but did state following the trial of this case and will testify that he served as yard master during the time that the repairs or rehabilitation or renewal of the track in question were supposed to have been made and that to his knowledge no such renewal or rehabilitation of said track was ever made during or at or about such time and that said Oriental Textile Lead was not shut down or spiked during the period of time indicated by the witness Neely.

None of this evidence could have been obtained by the plaintiff by reasonable diligence prior to the trial or during the trial of this case in that he had no reason to anticipate any such evidence coming from the defendant or any of its witnesses. Plaintiff himself knew of no such repairs or renewal of the track or spiking of the track and yet, being a switchman, was in no position to positively deny same and to prove conclusively that the witness Neely had given incorrect testimony it was necessary to institute a complete and thorough investigation immediately following the trial which has uncovered the foregoing evidence. Plaintiff was in the position that during the trial and prior to the trial he could not anticipate such evidence from the witness Neely nor, even after hearing same during the trial be in any position to prove or offer proof that same was false. The testimony of the witness Neely was highly damaging to plaintiff and undoubtedly caused the unjust and unfair verdict reached herein by the jury in that it suggested to the jury that within recent years of plaintiff's accident the track had been put in first class condition

when, in truth and in fact such evidence was false and incorrect. Upon a subsequent trial of this cause plaintiff intends to show by the foregoing witnesses that the testimony of Pat Neely is incorrect in the event defendant should seek to put him on again to give such incorrect testimony. Such evidence will be available upon a new trial and will undoubtedly change the result of the jury verdict.

WHEREFORE Premises Considered, plaintiff prays that upon hearing of this his motion for new trial the same be granted and that the verdict and judgment heretofore received and entered in this cause be in all things set aside, held for naught and vacated.

Respectfully submitted,

RAYMOND L. MCDERMOTT
1002 American Investors Bldg.
Houston, Texas, FA 3-6181
Attorney for Plaintiff.

STATE OF TEXAS
COUNTY OF HARRIS

Before me the undersigned authority on this day personally appeared Raymond L. McDermott, and known to me to be the person whose name is subscribed to the foregoing amended motion for new trial and on his oath he did depose and say that he is the attorney of record for the plaintiff, E. F. Hammons in this cause; that he is authorized to make this affidavit on behalf of plaintiff; that he has read over the foregoing amended motion for new trial and particularly paragraph XIII thereof; and that the matters of fact stated in paragraph XIII of said amended motion for new trial are true and correct.

RAYMOND L. MCDERMOTT

Subscribed and sworn to before me the undersigned authority on this 10th day of July, 1963, to certify which witness my hand and seal of office.

Notary Public in and for
Harris County, Texas.

Houston, Texas
June 25, 1963.

STATE OF TEXAS
COUNTY OF HARRIS:

BEFORE ME THE UNDERSIGNED authority on this day personally appeared Mr. George F. Gobel, known to me who after being duly sworn upon his oath deposes and says:

My name is George F. Goebel and I am a white male 70 years of age. I am married and live at 449 West 23rd Street. I am a painter by trade. I worked for many years for the Oriental Textile Mill. I have lived in the Heights area for about 58 years.

In 1938 I moved to West Texas. I returned to Houston in 1953 about the middle of the year. I moved into a house at 615 West 24th Street. I lived on West 24th until 1958 at which time I moved to 449 West 23rd. From 1953 until the present time I have walked the tracks along Nickleson Street. I am familiar with the spur tracks running from 23rd and Nickleson back to the Oriental Mill. I knew the spur was there when I worked for the mill. When I returned to the Heights in 1953 this spur track was open and has remained open from 1953 to the present time. When I returned in 1953 the Oriental Mill was still open and was shipping by rail and box cars. I have lived in this area and known it for 58 years. If this spur track from

West 23rd to the Textile Mill had been closed I would have known it, and I know it was not closed before the mill closed.

I have read the above affidavit and find it to be true and correct.

GEORGE F. GOEBEL

SUBSCRIBED TO AND SWORN to before me this 25th day of June, 1963.

JUDY LEWIS

Notary Public In And For
Harris County, Texas

My Commission Expires
June 1, 1965

Houston, Texas
July 8, 1963

State of Texas:
County of Harris:

Before me the undersigned authority on this date personally appeared Mrs. Beatrice V. Locke, known to me who after being duly sworn on oath deposes and say:

My name is Beatrice V. Locke and I am a white female 58 years of age. I am married to W. L. Locke and we reside at 2235 Marnel St.. I am not employed outside of the home. My husband worked for Oriental Textile Mill for many years. When the mill closed down he remained there and worked for Mr. James for about 2 years. When the mill closed in 1955 or 1956 we were living in the village

of the mill. We moved out in April 1956 to our present home. I know we moved to our present home in 1956 because I have the last rent receipt from our renters. It is dated March, 1956. While the Tex-Tile Mill was open it shipped by railroad car until they closed. After they closed they shipped the machinery out of the plant by rail. When this was shipped out in 1956 we moved to our present home. I moved into the Village in 1927 and lived there until 1956. I was living at Lawrence and 23rd St. to 24th Streets. During the time I lived at this location the railroad track going into the mill was always open. This spur track was never closed off and cars were pushed on it all the time. I lived right at the corner of 23rd and Lawrence and if this track would have been closed and removed I would have known it. The mill used this spur track during the war and it was never closed during the time I lived there. The trains went to the mill all the time I lived there and my husband worked there. I moved in the first part of 1956 to our present home.

I have read the above statement and it is true.

MRS. BEATRICE LOCKE

MICKEY COOPER

Subscribed and sworn to before me this 10 day of July, 1963.

HOWARD TANNER
Notary Public in and for Harris County, Texas

My Commission Expires June 1, 1965

APPENDIX "O"

Vernon's Annotated Texas Rules of Civil Procedure

RULE 1. Objective of Rules

The proper objectives of rules of civil procedure is [are] to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be praeticable, these rules shall be given a liberal construction.

Source: New rule.

APPENDIX "P"

RULE 434. If Judgment Reversed

When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or the damage to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial.

Provided, first, that no judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably

calculated to cause and probably did cause the rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court; and if it appear to the court that the error affects a part only of the matter in controversy, and the issues are severable, the judgment shall only be reversed and a new trial ordered as to that part affected by such error.

Provided, second, that if the erroneous action or failure or refusal of the trial judge to act shall prevent the proper presentation of a cause to the Court of Civil Appeals, and be such as may be corrected by the judge of the trial court, then the judgment shall not be reversed for such error, but the appellate court shall direct the said judge to correct the error, and thereafter the Court of Civil Appeals shall proceed as if such erroneous action or failure to act had not occurred. Amended by Order of March 31, 1941.

APPENDIX "Q"

RULE 418. Briefs: Contents

The brief for appellant should contain in the order here stated:

(a) A short, plain statement of the nature of the case without argument. A resume of the pleadings or evidence is seldom necessary and should be avoided.

(b) A statement of the points upon which the appeal is predicated, separately numbered in short form and without argument, and germane to one or more assignments of error when assignments are required. Such points will be sufficient if they direct the attention of the court to

the error relied upon and they should ordinarily be so concisely stated that they may appear, separately numbered, on a single page of the brief. Assignments of error need not be copied in the brief, and may be cited by reference only.

(c) A brief of the argument, presenting separately or grouped, if germane, the points relied upon for reversal, the argument to include (i) a fair, condensed statement of the facts pertinent to such points, with references to the pages in the record where the same may be found; and (ii) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. If complaint is made of any charge given or refused, such charge shall be set out in full. If complaint is made of the improper admission or rejection of evidence, the full substance of such evidence so admitted or rejected shall be set out with reference to the pages of the record where the same may be found. Repetition or prolixity of statement or argument must be avoided. As amended by order of March 31, 1941; order of Sept. 20, 1941, effective Dec. 31, 1941.

APPENDIX "R"

RULE 431. Amendment: Briefs

Briefs may be amended or supplemented at any time when justice requires upon such reasonable terms as the court may prescribe, and if the court shall strike or refuse to consider any part of a brief, the court shall on reasonable terms allow the same to be amended or supplemented.

APPENDIX "S-1."

(Excerpts from Cross-Examination of Plaintiff, E. F. Hammons)

S.F. 102-4 lines 1-25 to & thru line 11 at 104

A. Well, I was struck and then throwed to the ground. I was struck by the front of the engine; then I was hit against the rail and, therefore, I hit the ground.

Q. Did you suffer a severe traumatic shock?

A. I did.

Q. Have you ever suffered one of those before?

A. I did in 1952; yes, sir.

Q. You had a severe traumatic shock in 1952?

A. Yes, sir, when I had that accident; yes, sir.

Q. Didn't you claim to the railroad in that accident in 1952 that you had suffered a severe traumatic shock?

A. I did; yes, sir.

Q. As a matter of fact, you made representation to the railroad about that severe traumatic shock that you sustained, didn't you?

A. I did; yes, sir.

Q. You claimed it was going to last forever, didn't you?

A. That is right. I was told that.

Q. And it turned out it didn't last forever, did it?

A. It improved over the years.

Q. It didn't last forever, did it?

A. No, sir.

Q. You claimed it would last forever, but it didn't last forever. That is the fact of the matter, isn't it?

A. Yes, sir.

Q. All right. Now, you claimed in that accident in 1952 that you had sustained permanent and painful injuries, didn't you?

A. I did.

Q. You claimed you were never going to get over your back injury, didn't you?

A. That is right.

Q. But you did get over it, didn't you?

A. Yes, sir.

Q. As a matter of fact, as soon as everything settled down after that accident, you got over it, didn't you?

A. No, sir; I did not. There was a period of four years in there before I—

Q. Well, did you get over it after January of 1957?

A. I couldn't say the dates. I don't know.

Q. Well, it was about January of 1957 you got over your back injury, wasn't it?

A. I could say the date because I don't know.

Q. Didn't you give someone sworn testimony in that case?

A. I did, yes, sir.

Q. Testimony under oath, in exactly the same way you are doing here this afternoon?

A. I did.

Q. In Judge Snell's Court?

A. That is right; yes, sir.

MR. McDERMOTT: Object to the violation of the motion in limine by Counsel for the Defendant.

THE COURT: We will recess until tomorrow morning, at which time you will report back to the Courtroom.

(Out of presence of jury motion made for mistrial by Plaintiff, joined by Defendant, overruled by Court, S.F. 105-6)

Continuing Cross-Examination the next day by Mr. Miller:

S.F. 107-8 line 12 to line 13, p. 108

Q. Mr. Hammons, I believe when we recessed yesterday afternoon you and I were discussing this accident you had in 1952. Is that correct?

A. Yes, sir; I believe we were.

Q. Now, in that accident that you had in 1952, you received a back injury and an injury to your ribs and an injury to your stomach. Is that correct?

A. Yes, sir; and intestines.

Q. Did you receive a permanent back injury?

A. I was told it was permanent.

Q. Did you receive a permanent back injury?

A. Well, it has cleared up after four years. It is better now.

Q. Permanent, of course, you know, means forever and ever.

A. Yes, sir.

Q. Did you receive a permanent back injury?

A. No, sir; I did not.

Q. Did you receive a permanent stomach injury?

A. Well, I am still under treatment for my stomach.

Q. Did you receive a permanent injury to your knees?

A. Not on treatment; no, sir. It cleared up.

Q. Did you receive a permanent injury to your chest?

A. No, sir.

MR. MILLER: Mark that, please.

(Defendant's Exhibit No. 1 was marked for Identification by the Reporter.)

(Jury withdrawn for Bill of Exception of whether Plaintiff's Original Petition for damages for 1952 injury. Court sustained objection, S.F. 112, and Bill of Exception perfected by testimony from Plaintiff, S.F. 112-7. Court sustained Plaintiff's Objection, S.F. 117).

Continuing Cross-Examination and as reflected in the record a blackboard was used to compare claims resulting from the 1952 injury to the claim made for the 1960 injury which was in trial:

S.F. 117-126, line 20 to line 12, p. 126

Q. (By Mr. Miller) Mr. Hammons, at the recess yesterday afternoon we were talking about the injury that you got in 1952.

May I ask you some questions about that injury in relation to what you are claiming in this lawsuit here?

Now, as I understand your position and the answer to the questions that you have answered for Mr. McDermott, you claim that since you have been working for the Southern Pacific after this accident, you have been working in constant pain. Is that correct?

A. That is right.

Q. All right, sir. This is your 1960 accident we are talking about, isn't it?

A. I presume it is. That is what I was going on; yes, sir.

Q. I will write on the blackboard: "working in constant pain."

I believe you told us you are not able to do climbing. Is that right?

A. Not accurately; no, sir.

Q. "Can't climb."

A. I didn't say that. I said not accurately.

Q. Not what?

A. I said not adequately, is what I would mean. It is not what I would call adequately.

Q. "Can't climb adequately."

And you claim you have had mental anguish?

A. That is right.

Q. And you claim you have lost wages?

A. Some wages; yes, sir.

Q. You claim you had to do lighter work. Is that correct?

A. I did lighter work on the job. The position I worked on the job, some are heavier and some are lighter.

Q. I believe you said you have been trying to do high-balling?

A. Some of it; yes, sir.

Q. And you claim the men have been helping you?

A. Yes, sir; some.

Q. All right. You claim loss in earning capacity or ability to make money?

A. Yes, sir.

Q. You claim you have trouble walking?

A. Yes, sir; I do.

Q. Anything else now? Have we pretty well got it?

A. Well, there is numerous ways your knees hurt you. When you set for any time at all and you have to get up and walk, they hurt.

Q. You can't sit well?

A. Can't sit well; no, sir.

Q. Does it bother you to lie down?

A. No, sir; not as much.

Q. Can't sit good. Can't walk good. Right?

A. That is right; yes, sir.

Q. All right. Do you have pain in your legs?

A. Pain in my legs; yes, sir. I did have it above my legs.

Q. I believe while the jury was out I asked you in that 1952 accident if you had any trouble with your legs and you said you didn't?

A. That is right.

Q. No pain in your legs?

A. No, sir.

Q. In 1952, or until you got hurt in 1960?

A. Yes, sir; as far as I know.

Q. Okay. No trouble with legs in 1952.

I believe the only injuries you got were your back and your chest and your stomach and your internal organs?

A. And ribs.

Q. And ribs?

A. Yes, sir. And I had a minor sprain on my right knee later.

Q. That was 1958 or '59 when you were in that accident?

A. Well, it was a minor sprain just previous to that.

Q. All right.

MR. McDERMOTT: Just previous to what?

THE WITNESS: Just previous to the accident that I had in 1960.

Q. (By Mr. Miller) Just previous to the accident in 1960?

A. Yes, sir.

Q. Well, we are clear on this point: That you didn't have any trouble with your legs as a result of that 1952 accident?

A. That is right; yes, sir.

Q. You swear to that, don't you?

A. As far as I know I will; yes, sir.

Q. All right. And that formed no part of your serious injury in 1952?

A. No.

Q. That is a fact, isn't it?

A. As far as I know, yes, sir.

Q. And that is what you want the Jury to believe in this case?

A. Well, as far as I know I wasn't treated for no knee.

Q. Didn't have any trouble with it?

A. No, sir.

Q. All right. Now, I believe you said you have been working because you had to work?

A. That is right.

Q. Just been trying to tough it out?

A. That is right.

Q. Trying to tough it out.

We were talking about the 1960 accident, weren't we?

A. Yes, sir; that is what I'm talking about.

Q. All right. I believe you said your condition was bad. Right?

A. Yes, sir; it is.

Q. All right, sir. Does that cover what you claim in this lawsuit?

A. Yes sir.

Q. Now, Mr. Hammons, in that accident that you had in 1952, talking to you about your 1952 accident, now, you claim, looking at Number One that we wrote on the blackboard, that you were working under constant pain?

A. I was at that time.

Q. You did claim that, didn't you?

A. Yes, sir; I surely did.

Q. You represented, as a matter of fact, to the railroad, that you were working under constant pain in that 1952 accident, didn't you?

A. I was working under constant pain.

Q. For four years?

A. That is right. No, I don't exactly say four years, but I will say in a period of about four years.

Q. All right. You worked under constant pain. You didn't claim in that accident in 1952 that you couldn't climb?

A. Due to my back, yes, sir; I did.

Q. For whatever reason, you didn't claim to the railroad that you couldn't climb?

A. That it bothered my back to climb; yes, sir, I did.

Q. Okay. Couldn't climb. You didn't claim you couldn't walk?

A. Due to my back; yes, sir, I did.

Q. For whatever reason?

A. Yes, sir; for the back and ribs.

Q. For whatever reason, the form you furnished the railroad in 1956 about this accident in 1952, you said you couldn't climb. Right?

A. Due to a strain on my back, yes.

Q. And you claimed in that 1952 accident you had lost wages?

A. I had some lost wages; yes, sir.

Q. That is what you say you have got in this case, isn't it?

A. Yes, sir; that is right.

Q. And you claimed lost earning capacity in that other accident, didn't you?

A. That is right.

Q. You claimed you would never be able to work again, doing the work of a switchman, didn't you?

A. That is what I was told at South Pacific Hospital.

Q. You mean to tell me in the accident you had in 1952 you were told you would never be able to the work of a switchman again?

A. Right. That is what I was told; yes, sir.

Q. All right. "Never able to do the work of a switchman again."

You said in that accident that you had there that your condition was bad?

A. Yes, sir; but it improved over the years.

Q. Oh, did it? When did it start improving?

A. Somewhere in the neighborhood of four years it improved.

Q. It happened in what part of 1952?

A. I don't have the figures in my mind; so I couldn't tell you when in 1952 I got hurt.

Q. Well, let me refresh your recollection about it like your lawyer did.

Were you hurt on the 8th day of November, 1952?

A. Yes, sir; I believe I was.

Q. When was it after that that you started getting better?

A. Well, it was a gradual thing. It just didn't happen overnight.

Q. All right, sir. Just tell me whenever it was?

A. Well, it was a period of years there that I just gradually began to get better and better.

Q. Well, turn and tell the Jury when it was you started getting better.

A. Well, it was along in the latter part of the last four years.

Q. Well, come a little bit closer if you can. Was it 1955 or 1954?

A. No, sir. I think 1956 would be safe.

Q. In 1956?

A. Somewhere in that vicinity.

Q. When in 1956, would you say?

A. Well, I couldn't name the date because it didn't happen all at once. It just took a period of time there to get better.

Q. Well, was it during the Spring of 1956?

A. Well, it was just the year, along the fourth year. It just kept gradually improving.

Q. Well, was it in the Spring of 1956?

A. I couldn't say. I don't know, because it was over a period of years that went by. I couldn't name no particular month.

Q. And you had no improvement in your condition until 1956?

A. Well, it was gradually.

Q. Well, sir, what I am trying to find out is when it was that this bad injury that you got in 1952 started getting better. That is all I am trying to find out. Tell us.

A. To the best of my knowledge, it was the period of four years. It just didn't happen the first year or second year. It was just a period of time there that it gradually got better.

(Conference at Bench and Chambers, S.F. 126)

S.F. 126-132, line 20 thru line 2, p. 132

Q. (By Mr. Miller) Mr. Hammons, I want to turn for a minute to an investigation of the Number One item that I have written down under your 1952 accident.

In that connection, Mr. Hammons, I want to ask you if it isn't true that you testified under oath with reference to that accident at ten o'clock A.M. on the 20th day of April of 1956?

A. I don't know the dates, but—

Q. Let me refresh your recollection. I am handing you an instrument. You need not identify it. Just tell me if that doesn't refresh your recollection?

A. Yes, sir.

Q. That is when you testified about that 1952 accident, isn't it?

A. Yes, sir.

Q. At 10:00 o'clock A.M. in April of 1956. Correct?

A. Yes, sir; in April of '56.

Q. Did you testify in connection with that accident before a notary public such as Mr. Krippner here?

A. I did; yes, sir.

Q. Before you gave that testimony, did the Court Reporter have you raise your hand?

A. He did; yes, sir.

Q. What did he ask you?

A. To tell the truth and nothing but the truth.

Q. Did he ask you: "Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?"

A. He did.

Q. What did you tell him you would do?

A. To tell the truth.

Q. Have you read this instrument over that you have in your hand?

A. No, sir; not completely.

Q. You read part of it?

A. Yes, sir, part of it.

Q. When did you read it?

A. Just then. I read part of it.

Q. Have you since you testified under oath?

A. No, sir; I haven't.

Q. I beg your pardon?

A. No, sir.

Q. Not all of it?

A. Not all of it.

Q. Have you and Mr. McDermott discussed this instrument in any way?

A. Not the testimony I gave; no, sir.

Q. You have not discussed that. All right, sir. When you took that oath in connection with that testimony, you were asked some questions by a man by the name of John Heard, were you not?

A. That is right.

Q. Now, there were other people present with you at that time, were there not?

A. Yes, sir.

Q. And before you gave that testimony, you had carefully considered what you would be asked in connection with that testimony, hadn't you? I mean, they were not offhand statements. There were serious statements made under oath, weren't they?

A. They was made under oath; yes, sir.

Q. You were serious about it?

A. I was.

Q. You made the statements, as a matter of fact, and your purpose in making the statements was to describe the matters under consideration, wasn't it?

A. Yes, sir.

Q. I want to ask you, Mr. Hammons, if at that time

you weren't asked this question: "What is your condition at this time, Mr. Hammons?"

Of course, that is April of 1956, isn't it?

A. April; yes, sir.

Q. "What is your condition at this time, Mr. Hammons?"

And didn't you say under oath the following:

"Well, it is bad because I have now got to where I can't lay on my left side?"

Did you testify to that?

A. In connection with my back, yes, sir; I did.

Q. That was three and a half years after this accident happened, that you were still complaining bitterly that your condition was bad?

A. That is right.

Q. "Question: What pains do you have?"

"Answer: Well, I have them in the back and the legs."

And the legs, Mr. Hammons. Did you testify to that?

A. I don't recall legs; no, sir. My knees—No, sir, I didn't that I recall.

Q. Do you recall that before I started asking you these questions I asked you to tell the Jury if you had any trouble with your legs in that accident and you swore to them very seriously that you hadn't?

A. As far as I knew, I said. I don't recall any trouble with them at all, any treatment at all on my legs.

Q. I am reading now from Page 47 of this instrument:

"Question: Back and legs?"

"Answer: Yes."

Do you remember swearing to that under oath?

A. I recall swearing to the oath; yes, sir.

Q. "Question: What bothers you about your legs?"

"Answer: Well, the back of my legs."

You remember saying that?

A. No, sir; I don't.

Q. "Question: They hurt?"

"Answer: When I stand up on them, from the back down it bothers me."

Q. "Question: All the way to your toe?"

"Answer: Yes."

"Question: Both legs?"

"Answer: Yes, sir."

Do you remember swearing to that before Mr. John Heard?

A. No, sir; I don't remember the legs. No, sir.

Q. Well, the notary public who took your testimony was a man by the name of Gene Reynolds. Do you remember him, a tall black-headed fellow?

A. I don't remember all the people in there; no, sir.

Q. I'm going to hand you this instrument and ask you to look at it. I have underlined the part I just read to you. I want to ask you if that isn't what it says?

A. I don't recall saying it; no, sir.

Q. Well, sir, if necessary we can get the Court Reporter down here.

MR. McDERMOTT: We will stipulate that you have correctly read the transcript of that sworn testimony and that is what he testified at that time, April of 1956.

S.F. 132-141 line 13 thru line 14, p. 141.

Q. (By Mr. Miller) Mr. Hammons, this testimony was given over three and a half years after you had that accident, April 20th, 1956.

Didn't you represent to the railroad on that occasion

that you had had trouble with your legs for a period of three and a half years as a result of the accident you had in 1952?

A. As I say, I don't recall the legs.

Q. Well, sir, this testimony was given three and a half years after that accident happened and you were still complaining bitterly about your legs, weren't you?

MR. McDERMOTT: Your Honor, I object to Counsel arguing to the Witness. The Witness stated he did not recall and the question, as posed and framed, is argumentative. I object to it.

THE COURT: Will you read the question back.

(The last question was read by the Reporter.)

THE COURT: Overruled.

THE WITNESS: I don't recall the legs; no, sir.

Q. (By Mr. Miller) Well, Mr. Hammons, did you have pain in your legs?

A. As I say, I don't recall the legs.

Q. You don't recall any trouble with your legs?

A. No, sir.

Q. You never recall at any time during that long siege of four years of having any trouble with your legs?

A. No, sir; I don't recall any treatment at all on my legs.

Q. Do you recall any trouble with your legs?

A. No, sir; I don't recall any.

Q. You recall any pain in your legs?

A. Well, I may have had some pain in the back of the legs or something, but I don't recall any treatment of it.

Q. You don't recall that?

A. I don't recall no treatment of it.

Q. Is it your position now that you do remember having trouble with your legs?

A. No, sir; it is not.

Q. You do not remember having any trouble?

A. No, sir.

Q. Why did you testify that you had trouble with your legs?

MR. McDERMOTT: Your Honor, I object to that as argumentative.

THE COURT: Sustained.

Q. (By Mr. Miller) Mr. Hammons, would you have testified you had trouble with your legs if you didn't have trouble with your legs?

A. No, sir. I testified to the truth.

Q. All right. Now, when you gave this testimony in April of 1956, you testified that you couldn't walk, didn't you?

A. Due to my back. It bothered me in my back, is what I said.

Q. On Page 52 of your testimony in connection with that matter, you testified, did you not: "Question: Does it hurt you to walk?"

"Answer: Yes, or stand."

A. In the back.

Q. Did you testify to that?

A. In the back; yes, sir.

Q. "Question: All right. It hurts you to stand on your feet?"

"Answer: Yes, and when I walk around it increases more when I stand up."

Did you testify to that?

A. Well, I was referring to my back now.

Q. Did you say that?

A. Yes, sir; to the back. Yes, sir; I did.

Q. I want to ask you in connection with that matter if you didn't give evidence to the Court Reporter that you were just working and trying to tough it out?

A. I was, until I started getting better; yes, sir.

Q. You claimed the same thing in that lawsuit that you claimed in this case here, didn't you? Were those the very words that you used in connection with this testimony?

A. Well, the injury is different. It is more painful, what I have now.

Q. What you have now is more painful than you had then?

A. Yes, sir, because the knees—You use your knees every time you move your body.

Q. Is it your position in this case that your pain now is worse than it was in that accident that you had in 1952?

A. Well, I would say this accident is worse, yes, sir, to me.

Q. This accident is worse?

A. I suffered more from this accident than I did in the accident in 1952.

Q. You told the Jury this morning that in this accident of 1960 you have just been working and trying to tough it out, didn't you?

A. I have been working, yes, sir, but under pain.

Q. I will ask you if you didn't testify in that case, in this incident here, in answer to this question: "During the years 1953, 1954 and 1955, have you lost much time from duty?"

"Answer: No, sir; not so much duty. I was trying to go ahead and tough it out."

Didn't you say that?

A. I said it, due to the back injury.

Q. And now you say you are just trying to tough it out on the knee injury?

A. That is right.

Q. All right. And didn't you claim in this accident that you had in 1952 that the other men were helping you and carrying you on the job?

A. They did some; yes, sir.

Q. The same thing you claim in this case here?

A. Yes sir; that is right.

Q. Didn't you claim in that matter in 1952 through 1957; that you were just taking easy jobs?

A. As easy as I could get. I believe I stated that. In other words, there is part of the job that is easier than others.

Q. You couldn't walk good in 1952 through 1957, could you?

A. Due to the back. It hurt me in my back to walk.

Q. All right. I want to ask you, Mr. Hammons, if you have testified that you went to see Dr. F. O. McGehee?

A. I did; yes, sir.

Q. And you said, I believe, that he was your family doctor for bone problems?

A. That is right; he was.

Q. I want to ask you, sir, if it isn't a fact that you were referred to Dr. F. O. McGehee?

MR. McDERMOTT: Your Honor, I object to that on the ground it is a violation of the Court's ruling on the motion in limine.

MR. MILLER: I am not going to violate the Court's ruling.

THE COURT: Come up to the Bench, Counsel.

(Conference at the Bench.)

THE COURT: Overrule the objection.

Q. (By Mr. Miller) I am going to ask you, Mr. Hammons, if it isn't a fact that you were referred to Dr. F. O. McGehee in connection with this 1952 accident on the railroad?

A. No, sir. I was looking for a doctor and I had heard Dr. McGehee was a good doctor.

MR. MILLER: Will you come up to the Bench a minute?

(Conference at the Bench.)

Q. (By Mr. Miller) Mr. Hammons, who referred you to Dr. McGehee?

A. Well, they didn't anyone refer me to him. As I said awhile ago, I heard several people say he was a good doctor.

Q. Who did you hear it from?

A. I heard several people. I couldn't name them, but I heard several say he was the best bone doctor in town.

Q. Well, who?

A. I couldn't say because I don't recall the name. I don't recall the first one I heard say he was a good doctor.

Q. When did you stop going to Dr. McGehee for this 1952 deal?

A. Well, when he told me he couldn't do me any good, is when I stopped going to him.

Q. Now, Mr. Hammons, you testified yesterday that you

gave evidence concerning your physical condition in Judge Snell's Court in 1957. Is that correct?

A. That is right; yes, sir.

Q. Did Dr. McGehee give evidence in that same manner?

A. No, sir; I don't believe he did.

Q. I want to ask you, sir, if you didn't testify under oath up in Judge Snell's Court that you never had any trouble with your legs?

A. I don't recall the legs at all. No sir. I recall I had trouble walking with my back, but as far as the legs, I don't recall any trouble with the legs.

Q. Didn't you testify in Judge Snell's Court that you had a serious injury to your back?

A. I did have; yes, sir.

Q. Weren't you making complaints in January of 1957 about incapacity? Didn't you testify under oath up there in Judge Snell's Court about being incapacitated and unable to work?

A. In 1956?

Q. In 1957.

A. Whatever it was, I don't know the date.

Q. Well, it was January 7th, 1957, wasn't it, Mr. Hammons?

A. I don't recall the date; no, sir.

Q. It was after you gave this sworn testimony here that we have been referring to, wasn't it?

A. I don't know the date. I can't recall the date, because I just don't recall that far back.

Q. All right, sir. Before you testified in Judge Snell's Court, you were administered the same oath you were administered here in this Court, were you not?

A. Yes, sir.

Q. And you were asked questions about your condition, weren't you?

A. Yes, sir.

Q. And you testified that you were still seriously injured?

A. I was; yes, sir.

Q. And you testified that you couldn't work, didn't you?

A. I didn't testify that I couldn't work. I testified that I had been having trouble working.

Q. Well, it is the same thing, isn't it? You testified you weren't able to work?

A. I testified that I was having trouble working, doing my work.

Q. Well, that is the same thing you said here, isn't it?

MR. McDERMOTT: Counsel is arguing with the Witness. This is an argumentative interpretation of his answer.

THE COURT: Overruled.

Q. (By Mr. Miller) That is the same thing you testified to here, isn't it?

A. I have testified I have trouble doing my work; yes, sir.

Q. Today?

A. Today; yes, sir.

(After testifying concerning the injury to knees in 1960 incident and operation on knee on July 19, 1961 by Mr. McGehee, S.F. 141 to 144)

S.F. 144-5 line 4 thru line 14, p. 145

By Mr. Miller:

Q. That is about the same pattern you followed in your 1952 accident, isn't it?

A. It is possible it is.

Q. And in the 1957 accident, after you gave the testimony up in Judge Snell's Court, you started going back to work regular, didn't you?

A. I don't recall how regular I worked over the years, no.

Q. Well, from 1957 until you had this other accident here, did you work regular or miss a few days?

A. Yes, sir; I worked practically regular.

Q. Then, the facts are that after you gave that testimony in Judge Snell's Court, you started back to work regularly, didn't you?

A. I had to get by and support the family.

Q. Let me see if I understand your position on that: You testified, in answer to Mr. McDermott's question, that you were just working since this accident in 1960 because you had to?

A. To support my family.

Q. Is that any different from the way the situation was before 1960?

A. You will have to ask the question again. I didn't understand it.

Q. Why were you working before 1960?

A. I was working because I had a job and I wanted to support my family.

Q. The same reason you are working now?

A. Yes, sir; that is right.

Q. There is nothing different about that?

A. I was working under pain. That is different.

Q. Well, would you agree with me that it is certainly an honorable thing to work. You agree with that, don't you?

A. I think a fellow should work to support his family; yes, sir.

S.F. 150-3, line 24 thru line 9, p. 153

Q. All right. Now, in your accident of 1952, you worried about your condition a good bit, didn't you?

A. I sure did; yes, sir.

Q. And you went to a lot of doctors, didn't you?

A. I went to some to get corrected, to correct what damage was done.

Q. Let's see. You went to Dr. Gandy?

A. Yes, sir.

Q. You went to Dr. Dornak?

A. That is right.

MR. McDERMOTT: Speak a little louder.

THE WITNESS: Yes, sir.

Q. (By Mr. Miller) You went to Dr. Henry?

A. Well, there is some of the doctors I may not recall at this time.

Q. You went to Dr. McGehee, of course?

A. Yes, sir; I did.

Q. You went to Dr. Hutcherson?

A. Yes, sir.

Q.He is the one that told you you ought to give up switching?

A. I don't recall. I was told that at the S. P. Hospital.

Q. Well, you were told you ought to quit switching back in 1955, weren't you?

A. Back in 1952; yes, sir.

Q. You went to Dr. Fountain, who is a nerve doctor?

A. I believe the company sent me out there; yes, sir.

Q. You went to Dr. Robert Goodall, who is a nerve doctor?

A. Yes, sir; that is right.

Q. You went to Dr. Moore, who was a bone doctor?

A. For the S. P.; yes, sir.

Q. And you went to Dr. O'Herron?

A. That is for my kidneys; yes, sir.

Q. For your intestinal injuries?

A. Yes, sir.

Q. You went to Dr. Dickinson?

A. That was for an ear condition.

Q. That was for a nose operation you had?

A. Yes, sir.

Q. And you had an ear operation?

A. That is right.

Q. Actually, Mr. Hammons, since you went to work for the railroad in 1948, you have been over to the Southern Pacific Hospital time after time after time for things that are not even connected with any accidents, haven't you?

A. Various times. Yes, sir; I have.

Q. As a matter of fact, I believe you went to a Dr. Jackson Smith, did you not, sir?

A. I don't recall.

Q. Well, didn't you go to a Psychiatrist?

A. They sent me from over there to one; yes, sir.

Q. You were under psychiatric care for a while, weren't you?

A. Not with him; no, sir.

Q. Who was it with?

A. No one I know of; no, sir.

Q. I am going to write on the blackboard for your 1952 accident: "Give up switching."

(Cross-examination interrupted for Dr. McGehee's testimony at S.F. 159).

Hammons recalled for Cross-Examination, S.F. 259:

S.F. 259-60, line 16 thru line 10, p. 160

By Mr. Miller:

Q. Mr. Hammons, you and I have not talked yet about how this accident happened and about the charges of negligence that you are making against your railroad.

You testified about how that accident happened in 1952, didn't you?

A. I believe I did; yes, sir.

Q. And you gave a description of what happened?

A. That is right.

Q. And you charged the railroad with negligence?

MR. McDERMOTT: Your Honor, I object to anything about what he charged the railroad with in connection with another accident. It has no pertinence to this case.

THE COURT: Sustained.

Q. (By Mr. Miller) Well, you charged the railroad with negligence in this accident in October of 1960, didn't you?

A. Yes, sir; I did.

APPENDIX "S-2."

(Excerpts from Cross-examination of Switchman THOMAS M. HAIRSTON—but not a member of crew on Oct. 17, 1960)

Cross-examination by Mr. Miller:

S.F. 309, line 17 thru line 25

Q. Did you testify in 1957 for Mr. Hammons?

A. No sir; I didn't.

Q. Were you alerted to testify?

A. Yes.

Q. You were going to testify, then, weren't you?

A. Yes.

Q. And you were going to come down to Court and help Mr. Hammons that time?

(Plaintiff's objection overruled, S.F. 310)

S.F. 310, line 9 thru line 3, p. 311

Q. (By Mr. Miller) Well, sir, you are down here just to tell the truth in this case here. You were going to come down to Court and testify for Mr. Hammons in that other accident, weren't you?

A. No, not in that accident. He come and asked me—I had been working with him—He asked me if I would come up here as a character witness if he needed me.

Q. Okay.

A. I said I would and I come up here and they didn't need me, turned around and walked out and the case was settled. I didn't say a word. I didn't meet his lawyer; didn't know who he was.

Q. You didn't have to testify?

A. No, sir.

Q. That was in January of 1957, wasn't it?

A. Quite a spell back there.

Q. Weren't you going to testify in connection with that about how you had been helping Mr. Hammons on the job?

(Again Plaintiff's objection overruled, S.F. 311).

S.F. 311-4 line 8 thru line 8, p. 314

Q. (By Mr. Miller) Isn't that right, Mr. Hairston?

A. Say that again?

Q. Weren't you going to come into Court and testify in connection with that matter about how you had been carrying Mr. Hammons on the job?

A. I had been helping him; yes, sir. I would if he had asked me; if I would have had a chance to, I would.

Q. Weren't you going to come into Court and testify about seeing him and observing him and about the terrible back injury he had?

A. Yes, sir. That boy was wearing that brace then.

Q. In 1957 he was still wearing a brace?

A. Yes.

Q. I see. Was he complaining to you pretty bitterly about his condition?

A. Yes, sir; he was.

Q. Claiming, as a matter of fact, that he couldn't climb box cars?

A. He couldn't.

Q. And, as a matter of fact, you know he gave testimony in connection with that matter, don't you?

A. No, sir. I don't know because the boy didn't open his mouth and neither did I the day I come up here. I didn't get to sit down. His lawyer walked back in that little room and walked right back. I didn't get to sit down good. I didn't know who his lawyer was. I didn't see him, as far as I am concerned.

Q. I see. Okay. Well, he had some trouble with his legs, didn't he?

A. No, sir; not then.

Q. Hadn't he complained to you about pain clear down to his toes?

A. No, sir; he hadn't.

Q. Not at all?

A. No, sir.

Q. Hadn't he complained to you about not being able to do his job?

A. Yes, sir.

Q. Not being able to climb from car to car?

A. Right.

Q. Not being able to switch good?

A. He could switch good, but you can't climb on them cars, set those brakes and throw them switches.

Q. I see. All of those things happened back as late as January of 1957, didn't they?

A. As much as I can remember.

Q. He said as much as I can remember. Mr. Hairston, I suppose it goes without saying that neither you nor I is a doctor, are we?

A. No, sir.

Q. We are not giving medical opinions in this case?

A. No, sir.

Q. That would be about as good a way to get trapped as any, wouldn't it?

A. Yes, sir.

Q. Mr. Hammons has been doing the work of a Foreman?

A. I believe he did work a job one day here a good while ago.

Q. Hasn't he worked quite a bit as a Foreman?

A. Not to my knowledge; no, sir. He has not on that job because he won't work.

Q. I see.

A. He won't work unless he gets forced to. Now, they can force you to work.

Q. Now, in connection with that matter in 1957, were any of the rest of these gentlemen out here down here with you?

A. No, sir. Just me and him, by ourselves.

Q. I see. Have you listened carefully to what I asked you?

A. If any of those gentlemen were with me?

Q. No. I say: Have you listened carefully to the questions I asked you?

A. Yes, sir; I think so.

MR. MILLER: Thank you very much.

APPENDIX "S-3."

(Excerpts from Cross-Examination of Dr. McGehee, a bone specialist who had operated on Plaintiff's left knee, July 19, 1961, and had treated Plaintiff's back by reason of the 1952 injury)

Cross-examination by Mr. Miller:

S.F. 205, line 5 thru 10.

Q. Dr. McGehee, I notice you have got you a little glass of water there.

A. Yes, sir.

Q. Is that for cooling you off or cooling me off?

A. Well, am I going to have to cool you off?

Q. I hope not.

S.F. 207-8, line 21 thru line 8, p. 208

Q. For example, I believe the sum and substance of your testimony about Mr. Hammons' 1952 accident was that you never could find very much wrong with him, could you?

A. That is right.

Q. Yet the other doctors, according to the evidence he has given here, thought he ought to quit switching. Did you know that?

A. No, sir.

Q. That is a perfect example of what you and I are talking about, how doctors have different opinions.

A. Yes, sir.

(Legitimate Cross-examination, including suit being filed for $90,000 date the Dr. had released Hammons from the Hospital where he had performed an operation on Plaintiff's knee in July, 1961).

S.F. 214-9, line 1 thru line 19, p. 219

Q. Had Mr. Hammons made up his mind in July of 1961 that he was never going to get well?

A. I don't know.

Q. Well, sir, isn't that particularly important where you are having to place heavy reliance on the accuracy of what he tells you?

A. Yes, sir; it is.

Q. For example, here in this petition that he has filed it is alleged that he has got the reasonable probability of permanent diminished earning capacity and that he is going to suffer pain for the rest of his natural life.

Now, this is all on the very day you released him from the hospital?

A. Yes, sir.

Q. That is what you are talking about when you say these lawsuits affect the attitude of the patient, don't they?

A. Yes, sir.

Q. We can demonstrate that in Mr. Hammons' case, can't we, more clearly, by looking at his accident in 1952?

A. I don't know what you mean.

Q. Well, let me explain it to you.

You said that as far as you were concerned, this accident that he had in 1952 didn't amount to very much?

A. Yes, sir.

Q. As far as you were concerned, you never could find anything wrong with him. That is true, isn't it?

A. Well, I didn't say that.

Q. Well, that is about what you said.

A. I said he had a back sprain.

Q. You about said he didn't have anything wrong with him?

A. Well, I felt he could go back to his regular work.

Q. Yet, did you know that in April of 1956, four years or almost four years after the accident happened, that the man gave sworn testimony under oath that he was getting worse and worse and worse and worse?

A. No, sir; I didn't.

Q. You didn't know that?

A. I didn't know that.

Q. Yet, you say that in connection with that accident, as far as you were concerned, he was practically well?

A. Yes, sir.

Q. What is the explanation, Doctor, for a patient who doesn't have anything wrong with him who continues to complain and complain and complain of pain and disability?

A. I don't know.

Q. You don't know. There is a medical explanation for that, isn't there?

A. There may be.

Q. So, in the 1952 accident, while you say that he had some kind of a sprain or something of that character did you know that when he gave his testimony that he said he was working in constant pain?

A. In 1952?

Q. In 1956, three and a half years after this accident in 1952, did you know that?

A. Let me see when the last date is that I saw him.

Q. All right, sir.

A. I believe the last date that I saw him was in October of 1956, and he told me then and on the previous visits, that he was still having some pain. I have that noted.

Q. Did you know that when he testified in Judge Snell's Court in January of 1957, that he was complaining bitterly about his physical condition?

A. No, sir; I was not there.

Q. You didn't know that, did you? Yet, you tell Mr. McDermott here that you had released him in 1956?

A. That is right.

Q. What is the medical explanation for a person who continues and continues and continues to have complaints when there isn't anything wrong with him?

A. I think he may have hysteria or something of that nature.

Q. Hysteria. For example, did you know that in connection with his 1952 accident that he claimed he couldn't climb?

A. No, sir.

Q. He claimed he had mental anguish of a very severe and excruciating character?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. Did you know that he claimed he could only do lighter work?

A. No, sir.

Q. That he actually couldn't do that, but the men were helping him on the job?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. He claimed he had a permanent loss in his earning capacity as a result of that accident in 1952?

A. No.

Q. You didn't know that?

A. No.

Q. He claimed he couldn't sit down good, couldn't walk good; was just trying to tough it out, is the way he put it.

If all that is true, these 12 items that have been written here on the blackboard — If all that is true, that was indeed a serious condition, wasn't it?

A. Well, it was either a serious condition or else he had hysteria, like I say.

Q. It was either a serious condition or being made to appear to be a serious condition, wasn't it?

A. Yes, sir.

Q. All right. Now, that is the situation that we are dealing with, Dr. McGehee, in this case here.

I am asking you with reference to the accuracy of his testimony to you, to take into consideration the things that he complained about in 1952 through 1957.

Incidentally, when people have these lawsuits, once a lawsuit is over with, you frequently don't see them any more?

A. That is frequently true.

Q. That is frequently true, isn't it?

A. Yes, sir.

Q. For example, you didn't see Mr. Hammons after October of 1956, did you, until he had another accident?

A. That is right.

Q. All of a sudden, January of 1957, he has got this terrible condition, but he never comes back to you?

A. You mean these conditions?

Q. Yes. They are terrible if they are true, aren't they?

A. Yeah. They sound bad.

Q. Sure do, don't they?

A. Yes, sir.

Q. Okay. Now, can a person complain of pain and not have pain?

A. Yes, sir.

Q. If I came into your office and said, "Dr. McGehee, I have got a terrible, terrible headache." Have you got a machine that you could put me in to see whether or not I was being accurate?

S.F. 220, line 2 thru line 16

A. No, sir.

Q. Don't have a pain meter to strap on somebody to see if they have got pain?

A. No, sir.

Q. If you did have, it would take a lot of guess work out of these lawsuits, wouldn't it?

A. I think it probably would.

Q. Yes. Okay. Now, as a perfect example of what you have told us about how doctors disagree as to what a good example of that, isn't it?

A. Yes, sir.

Q. And if a doctor chose to believe everything that is written there under that 1960 accident, he would have to say that Mr. Hammons had a serious condition?

(Question at S.F. 225—"Do you need a drink of water?" Dr. replied, "No, I am not mad.")

(Attorney pops knee, but Dr. testified that was not *what* he was talking about, S.F. 232).

S. F. 235, line 7 thru line 25

Q. You couldn't figure out why he was still having trouble?

A. That is right.

Q. Or what was causing it?

A. That is true.:

Q. You wrote Mr. McDermott as much, that you couldn't explain it?

A. That is right.

Q. One possible explanation could be this $90,000 lawsuit, couldn't it?

A. Yes, sir.

Q. Once this lawsuit is over with, he may do the same thing to you that he did in 1956 and just stop coming to you. Right?

A. He could; yes, sir.

Q. That is what he did in 1956, isn't it?

A. Yes, sir.

Q. You never saw him again after October of 1956, until he had this lawsuit here?

S.F. 237-9, line 1 thru line 11, p. 239

Q. If a person has a tendency, that has been demonstrated in Court, to exaggerate his complaints in one accident, he may also have that tendency when another one comes along. Isn't that true?

A. That is right.

Q. You are satisfied, are you not, Doctor, that Mr. Hammons was gilding the lily in 1956. You are satisfied of that, aren't you?

A. Well, if you are talking about his knee complaints, he didn't make those to me, so I am really—

Q. Well, will you take my word for it that he has testified here in Court that he had those complaints?

A. Yes, sir.

Q. If that is true, it is a clear case of gilding the lily, isn't it?

A. Must have been; yes, sir.

Q. And you say if a man will do it once, he may do it again?

A. Yes.

Q. Right.

A. Yes, sir.

Q. You have heard the expression, haven't you, "Pretty is as pretty does?"

A. Yes, sir.

Q. And, "The proof of the pudding is in the eating?"

A. Yes, sir.

Q. You have heard that, haven't you?

A. Yes, sir.

Q. For example, a man can come into Court and say he can't work. That doesn't take very long, does it?

A. I don't think so.

Q. But going on the job day after day after day after day after day, working, that is pretty good evidence that a man can do work, isn't it?

A. Yes, sir.

Q. For example, you know, of course, that Mr. Hammons has been working doing switching work?

A. Yes, sir.

Q. He has told you that he has had to take lighter work?

A. That is right.

Q. Of course, you that is the very same thing he claimed back in 1956?

A. Well, that is what you said; yes, sir.

Q. It is the truth.

A. Yes, sir.

Q. And he has told you, of course, that these other people are carrying him on the job?

A. Yes, sir.

Q. And that is the very same thing he claimed back in 1956 and 1957. You knew that, didn't you?

A. I didn't. I do now.

Q. You accept that as the truth, don't you?

A. Yes, sir.

Q. And he has told you, and you have testified here, he is just working because he has got to support his family?

A. Yes, sir.

Q. That is the very same thing he claimed back in 1957 and 1956 to explain why he was working?

A. No, I didn't.

(Attorney asked "Still don't need a drink of water", S.F. 245)

APPENDIX "S-4."

(Excerpts from Cross-examination of Walter B. Kyle — a Switchman)

Cross-Examination by Mr. Miller:

S.F. 355-6, line 18 thru line 12, p. 356

Q. This accident that he had in 1952, when did you learn about it?

A. Oh, I learned about it shortly after it happened.

Q. Who told you about it?

A. The man in the Yard—All the men in the Yard were talking about it.

Q. I am sorry.

A. The man in the Yard was talking about it, all the men talk about what goes on in the Yard.

Q. Talk about accidents that happen when one unfortunately does happen?

A. Right.

Q. Did you give Mr. Hammons' lawyer a statement in connection with that 1952 accident?

A. No, because I was not involved.

Q. You didn't know anything about it.

Have you given a statement to Mr. McDermott or to his investigator?

A. About the 1952 accident, no.

Q. About the 1960?

(Cross-examination about his statement given to counsel for Plaintiff, talking with counsel or others from his office, and numbers of times he had seen Plaintiff. S.F. 356 to 366).

S.F. 366 line 4 thru line 18

Q. All right. And did you see him [Hammons] from time to time when he had that accident from 1952 to 1957?

A. Yes.

Q. He gave evidence in that case when he testified, that in connection with that matter he had pains in his legs all the way down to his toes in both legs. Do you remember that?

A. No, sir.

Q. You don't remember that. Did you ever know of him having any difficulty working around the cars in 1957?

A. Yes, sir.

Q. He did have, didn't he. Were you helping carry him on the job back in those days?

A. No, sir.

APPENDIX "S-5."

(Excerpts from Cross-examination of Everett S. Kyle — a Switchman)

Cross-examination by Mr. Miller:

S.F. 438-9, line 12 thru line 19, p. 439

Q. I see. All right. Now, you have told us about the complaints that Mr. Hammons has had about his legs.

I want to read to you some of Mr. Hammons' sworn testimony and ask you if this is the kind of thing he has been complaining about recently?

MR. McDERMOTT: Your Honor, I object to Counsel comparing the testimony of one witness with another.

MR. MILLER: It seems to me I am entitled to determine whether this Witness has heard the Plaintiff testify as to the same things he said here.

MR. McDERMOTT: Your Honor, it is not proper to ask a Witness to give his testimony in the light of or in comparison to another Witness' testimony, and that is my objection.

THE COURT: I don't really understand the first question. I don't understand the question this discussion is predicated on.

Will you reframe that question?

MR. MILLER: Sure will.

Q. (By Mr. Miller) You have testified about what Mr. Hammons has complained to you about his legs since this happened, what you have seen him about, haven't you?

A. I don't believe Mr. Hammons has told me anything particular about his legs, but I have seen—

Q. All right. Have you seen him having trouble walking?

A. Yes, sir; he does hop some.

Q. So he could hardly walk?

A. Well, I would say not walk properly.

S.F. 440-3, line 11 thru line 4, p. 443

Q. All right. Now, let me be sure I understand what you said about his accident back in 1952.

That was in 1952 that that happened, wasn't it?

A. I couldn't be sure on the date.

Q. Well, if I tell you that the evidence in the case is that he got hurt in November of 1952, does that sound about right?

A. Yes, sir; about right.

Q. And then you worked with him from that time up until he had this accident in 1960?

A. Off and on; yes, sir.

Q. Did you see him fairly regularly during that period?

A. Well, that would be—I might see him two or three times this week and then it might be three or four weeks before I would see him again.

Q. That is about the way it has been since you have been with him from October of 1960 when he had this other accident?

A. Yes, sir. Not regular with him, but maybe a few times right close together and then it may be a month or

even longer before I would work with him again or see him.

Q. All right, sir. And you said, I believe, in answer to Mr. McDermott's questions, that during the first year and a half or two years after he hurt his back, you could tell he was having trouble with it?

A. Yes, sir.

Q. Did he ever complain to you about anything else besides his back?

A. No, sir; he didn't.

Q. Then, after about a year and a half or two years, which would be some time in 1954, he got so he could do everything he was supposed to do?

A. The best of my remembrance, I can't remember the dates or exactly the year, but I do know that he appeared to have got over it; that he didn't complain about his back any more and he could get up and down on the box cars without any trouble.

Q. And would you say that that recovery occurred within about a year and a half or two years after he was hurt?

A. I would guess some time near that time.

Q. Then, if that is correct, there would have been no reason, in April of 1956, some four years later, for there to be anything wrong with him as far as you could observe. Isn't that correct?

A. Would you mind repeating that?

Q. Yes, sir. You said as far as you could tell he was well in about a year and a half or two years and from that time forward he worked and you didn't see that he had anything wrong with him?

A. That is correct.

Q. That would bring us up until the latter part of 1954, wouldn't it?

A. Somewheres near that.

Q. And if he was well in 1954, there wouldn't be any reason in the world that you know about why he ought to be in Court swearing that he was still disabled. Isn't that true?

A. Well, I don't remember exactly what time, but I do know that he did get over his back injury, or appeared to be, somewheres in the 50's, say two or three years after the accident; something of that kind.

Q. Now, is it important that a switchman have a strong back?

A. I would say it is important.

S.F. 443, line 8 thru line 11

Q. You were not called to testify in connection with this other matter in 1957, were you, Mr. Kyle?

A. Well, I don't know what matter you are speaking of, but I was not called in 1957 to testify.

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E. F. HAMMONS,
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v.

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. WILL THE PROTECTION OF THE SEVENTH AMENDMENT BE DENIED TO RESPONDENT?

II. WILL THE SUPREME COURT REDETERMINE THE FACTS FOUND BY A JURY?

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

1. Petitioner, a switchman by profession, brought suit for negligence under the Federal Employers' Liability Act in the State Court of Texas (although he could have elected to bring suit in the Federal Court). He selected trial by jury. This petition is simply an appeal by a litigant to a higher court to save him from an adverse jury verdict on the only issue of liability requested by him: Whether

respondent negligently failed to maintain a section of railroad track. The testimony presented by plaintiff (and "corroborated" by his friends) was directly contradicted by the roadmaster in charge of maintenance and the current track inspector. The District Court and the three Justices of the Court of Civil Appeals agreed that the resolution of the conflict was properly made by the jury. Surely the protection incident to the institution of trial by jury, as provided for in the Federal Employers' Liability Act and as guaranteed by the Seventh Amendment, is afforded equally to the parties in a lawsuit, plaintiff or defendant. Respondent has been vindicated by a jury whose verdict has been sustained on appeal. The matter should now be at an end.

2. Petitioner wishes to translate such cases as *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 into a holding that, in a FELA case, the jury *must* find a railroad negligent on very little evidence, regardless of the credibility of the witnesses. If the jury does not find negligence, petitioner wants an appellate fact finding, inconsistent with the jury's, that the railroad was negligent. However, *Rogers* and other similar decisions, e.g. *Maynard* v. *Durham & S.R. Co.*, 365 U.S. 160; *Michalic* v. *Cleveland Tankers Inc.*, 364 U.S. 325, present the exact opposite situation. Those were cases wherein the Supreme Court reviewed the evidence because the lower court had taken the case away from the jury for judicial determination. The effect of the Court's opinions in those cases was to protect — not to destroy — the jury's verdict. To achieve his own result, petitioner would have this Court undermine the many decisions required to uphold the integrity of the jury's verdicts against judges' efforts to substitute their views of the way the jury should have found the facts.

3. The Supreme Court, as an appellate Court bound by the Seventh Amendment, would uphold the findings of the

jury. As stated in *Atlantic & Gulf Stevedores* v. *Ellerman Lines,* 369 U.S. 355, 358-359, the Supreme Court cannot "redetermine facts found by the jury . . ." and "Where there is a view of the case that makes the jury's answers to the special interrogatories consistent, they must be resolved that way. For a search of one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment." 369 U.S. at 364.

4. It is indeed strange that the petitioner calls upon the Supreme Court to apply the state standard of the sufficiency of the evidence instead of the federal standard, which has been so carefully established in such cases as *Rogers* v. *Missouri Pacific R. Co., supra.* In addition to a "no evidence" power of review over the jury's verdict, the State courts of Texas have the power to reverse and to remand a case, even when there is sufficient evidence to require submission to the jury, whenever, in the opinion of the Court of Civil Appeals, the verdict is "against the great weight and overwhelming preponderance of the evidence." Chief Justice Robert Calvert, " 'No Evidence' and 'Insufficient Evidence' Points of Error," 38 Texas L. Rev. 361; e.g. *In Re King's Estate,* 150 Tex. 662, 244 S.W. 2d 660. This power exists because the Texas Constitution, unlike the Seventh Amendment to the federal Constitution, provides that the Court of Civil Appeals, not the jury, has the final power to decide all fact questions. Tex. Const. Art. 5 §6. An unsuccessful effort has already been made to apply the Texas standard to FELA cases. In the case culminating in *Deen* v. *Hickman,* 358 U.S. 57, this Court made it clear that the federal standard, not the Texas standard, applied in FELA cases. Nevertheless, petitioner invites this Court to use the state standard as a device to supplant the jury's function in FELA cases tried in Texas state courts.

5. Petitioner's complaints regarding the submission of an issue inquiring whether the accident happened without

the negligence of any party to the event is academic, since the jury found that there was no negligence on the part of the respondent.

6. Petitioner's final complaint is that he was impeached in his cross-examination through the use of prior inconsistent statements made in connection with other claims against the respondent. As the Court below noted, petitioner never requested the trial Court to instruct the jury not to consider the impeachment in judging petitioner's credibility. (Petition, p. 62)

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should not be granted.

Respectfully submitted

.....

TOM MARTIN DAVIS

.....

RICHARD B. MILLER

.....

GORDON GOOCH

CERTIFICATE OF SERVICE

This is to certify that on the ..... day of August, 1965, a true and correct copy of this Brief in Opposition was served on John P. Spiller, 1307 Sterling Building, Houston, Texas 77002 by placing same in the United States mails, properly addressed, postage prepaid, certified mail.

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TOM MARTIN DAVIS

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PETITIONER'S SUPPLEMENTAL BRIEF AND REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

REPLY TO RESPONDENT'S QUESTIONS

I. A reexamination of the evidence by this court does not deprive Respondent of its protection under the seventh amendment where such reexamination will show no competent evidence of probative force was adduced by Respondent to explain or overcome the presumption of negligence where there was a derailment of the switch engine on the occasion in question or to contradict the positive evidence of Petitioner and his two witnesses (Employees of Re-

spondent) where if such testimony concerning the condition of the track in question had been untrue Respondent could have contradicted same by producing those employees who came to the scene immediately after the derailment to testify, but such witnesses were not called to testify. The roadmaster did not come to the scene at the time of the derailment and knew nothing about it until the morning he was called to testify.

II. This court has not been asked to "Redetermine" facts found by the jury, but Petitioner earnestly urges this court to determine whether governing rules of federal law have been properly applied to the facts, and whether Petitioner has been deprived of his federally created rights under the FELA.

REASONS WHY THE PETITION SHOULD BE GRANTED

It appears the position of Respondent is that the Seventh Amendment precludes an examination of the facts by this Honorable Court inasmuch as the Jury verdict has been found in favor of Respondent and against Petitioner in this FELA case. This position begs the issue. In *New York Times Co. v. Sullivan,* (1964) 376 U.S. 254, 287, 84 S.Ct. 710, 729, 11 L.Ed 2d 686, 95 A.L.R. 2d 1412, Mot. Den., 376 U.S. 967, it was concluded that the facts did not support the finding of *actual malice* on the part of the Times. At footnote 26 it was there said:

> "The Seventh Amendment does not, as respondent contends preclude such an examination by this Court. That Amendment, providing that 'no fact tried by a

> jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law,' is applicable to state cases coming here. * * * * * But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. '[T]his Court will review the finding of facts by a state court * * * where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

In the case at bar, Respondent does not dispute the fact that there was no evidence raising the issue of "unavoidable accident" or that under the State local practice and procedure it was indispensable to Petitioner's case to prove that his injuries resulted from the negligence of Respondent, but also he had the *burden to prove that the event "was not an unavoidable accident" as a necessary part of his case.*[1] The imposition of the burden of proving the derailment "was not the result of an unavoidable accident" is squarely contrary to the holding of this Honorable Court in *Central Vermont R. Co. v. White,* (1914) 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed. 1433. There White was killed in a rear-end collision while employed as brakeman on the Vermont Central Railway. The company claimed the State court erred in holding that under the FELA the burden in respect to contributory negligence was on the railroad

[1] Cf. 2 Harper & James, The Law of Torts (1956) 12.2, p. 747 et seq. Historical, the term "unavoidable accident" appears to be obsolete relic or remnant carrying over when damages could be recovered in an action for trespass and strict liability was imposed unless the defendant proved the injury was caused by an inevitable or unavoidable accident. "Unavoidable accident" was then an affirmative defense to be pleaded and proved by the defendant.

company. Such contention was made on the ground the burden of proof as to contributory negligence was a mere matter of State procedure. In overruling the Railroad's contention, this Honorable Court said:

> "For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further, and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. *In those states the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action.* But the United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in states which hold that the burden is on the plaintiff. * * * Congress, in passing the Federal employers' liability act, evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts. Such construction of the statute was, in effect, approved in Seaboard Air Line R. Co. v. Moore, 228 U.S. 434, 57 L.Ed. 907, 33 Sup.Ct.Rep. 580. There was, therefore, no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof." (Emphasis supplied, 59 L.Ed. 14, at page 437; 238 U.S., at page 512).

Respondent takes the position it is academic concerning the fact the trial court submitted to the jury the issue of "un-

avoidable accident" because the jury found there was no negligence on the part of Respondent. It is the position of Petitioner that the question concerning the "unavoidable accident" issue is not academic, particularly where it affects the burden of proof of Petitioner's case under the FELA. The question of who has the burden of proof raises a substantial Federal question which is controlled by Federal law rather than State law. This question has been decided by the State courts in a way that is not in accord with applicable decisions of this Court. There can be no uniformity of decisions in a FELA case brought in a Texas State court with the decisions of this Court or other State courts where under the Texas law, practice and procedure the burden is cast upon a plaintiff to negate, as part of plaintiff's case, defendant's affirmative defense of "unavoidable accident" as well as the burden of proving negligence.

This Court has determined "unavoidable accident" is not available as a defense to an action based on unseaworthiness.[2] While several Texas courts have judicially recognized the submission of the issue "unavoidable accident" and its accompanying instruction is misleading and confusing to jurors, there has been no case which has been reversed because the issue was given to the jury. In other state jurisdictions, the submission of the issue of "unavoidable accident" instruction on "unavoidable accident" have constituted prejudicial error, whereby the cause was reversed, even though the jury found no negligence on the part of defendant.[3]

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[2] **Pope & Talbot v. Hawn** (1953) 346 U.S. 406, 74 S. Ct. 202, 98 L.Ed 143.

[3] **Butigan v. Yellow Cab Company** (1958), 49 Cal. 2d 652, 320 P. 2d 500, 65 ALR 2d 1, where an "unavoidable accident" issue and instruction was condemned because of the tendency to con-

While the attention of this Court has heretofore been called to an admonition given by the Fifth Circuit on the "unavoidable accident" issue,[4] such admonition was again repeated when the cause was reversed for the second time in *Page v. St. Louis Southwestern Railway Company* (Opinion handed down on August 10, 1965).[5] There, Circuit Judge Brown, speaking for the Court, reiterated its admonition that in a [FELA] case, "an issue on unavoidable accident confuses and tends to distract the jury's attention from the simple issues." (Op. p. 11-12).

It is sheer speculation for Respondent to assert the submission of the unavoidable accident issue is academic because the jury found that there was no negligence on the part of the Respondent. It is impossible to measure the extent the jury was distracted from what should have been its focal point of consideration on the evidence, to-wit, whether negligence of the employer played any part, however small, in the injuries sustained by Petitioner, *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed. 2d 493; see also *Urie v. Thompson*, 337 U.S. 163, 174, 69 S. Ct. 1018, 1027, 93 L.Ed. 1282.[6]

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fuse and mislead the jury and overemphasize defendant's case, held the giving of the instruction was **reversible error; Miller v. Alvey** (1965) Ind.Sup.Ct. 207 N.E.2d 633, citing many cases to support its view, condemns the submission of the issue and instruction on "unavoidable accident" on the ground "[it] **has no particular** connotation in modern pleading of negligence cases. * * * The expressions are ambiguous and particularly confusing to lay jurors. Their use in instructions is undesirable and unwise * * *." The cause was reversed because of the instruction on this issue.

[4] **Page v. St. Louis Southewestern Ry. Co.** (5th Cir. 1963), 312 F.2d 84, 93 cited in Petition for Certiorari, pp. 36, 40, 41.

[5] See Appendix.

[6] '(W)hat constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under State and local laws or for other purposes. Federal decisional law formulating and applying the concept governs.'

Petitioner sustained his injuries when there was a derailment of the switch engine on an industrial spur track. A rail was also broken. By reason of the injuries sustained by Petitioner following this event, he was carried from the scene by Assistant Trainmaster Martin and transported to the Southern Pacific Hospital and Clinic. The undisputed evidence showed that Respondent's section crew came to repair the track and the roundhouse crew came out to repair the engine so it could be moved on the track. Neither Mr. Martin nor any member of the Respondent's repair crews testified in the case at bar, and no explanation was made why Respondent did not call them.

This Court held in *Jesionowski v. Boston & Main R.R. Co.*, (1946), 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed 416, the fact of derailment called upon the defendant railroad to make *an explanation*. In the case at bar, the Respondent tendered no competent evidence of probative force *to explain the derailment or the broken rail* despite the fact such testimony was available to them if, in fact, there could be an explanation. While Repondent argues before this Court that the testimony of roadmaster (Neely) and the current inspector of the track (Dukes) contradicted the testimony of Petitioner and his two witnesses who were members of the switching crew, the testimony of the roadmaster reflects *he did not go to the scene of the derailment at the time it occurred and did not even know about it until the morning he was called to testify in court*. The event of the derailment occurred on October 17, 1960. The cause went to trial in the District Court in Harris County, May 22, 1963 (App. "G", p. 70, Pet. Writ of Cert). The "current track inspector" (Dukes) did not start any work as a track inspector for Respondent until *March 15, 1963*. An explanation was made that track inspector Welch (charged with duty to inspect track in question at the time

and prior to the derailment in question) had had a heart attack and could not testify. The absence of such testimony from Welch can raise no presumption he had, in fact, properly inspected the track in question prior to the derailment even though he was charged with the duty to properly inspect same. The roadmaster's testimony of what Welch was charged with the duty to perform was *hearsay* insofar as the type of inspection that was *actually* made of the track in question. Respondent made no explanation why its employees, who arrived at the scene on October 17, 1960 to repair the track and engine were not called to testify in the case at bar. Respondent and its agents took possession of the broken rail immediately after the accident. Thus, under the record as it was developed in the case at bar, Respondent did not discharge its duty to make any *explanation of the derailment and of the broken rail* by any competent evidence of probative force, which Respondent could have produced and was available to it if the testimony of Petitioner and his witnesses (members of same switching crew) had been untrue. Petitioner and his witnesses testified concerning the condition of the track in question. There is no competent evidence to contradict their positive testimony the crossties were rotten; the switch engine wobbled on the track; it was a fresh break in the rail and the rail itself was narrow and old. Thus, the presumption of negligence was never explained.

It is respectfully submitted the questions presented in the Petition for Certiorari pertain to substantive law controlled by Federal law rather than State law and have been decided in a way that is not in accord with applicable decisions of this Court. There has been no proper judicial appraisal of the evidence by the State court to determine whether the jury was justified in reaching a conclusion of

"no negligence" on the part of Respondent. A fair inference is that the jury was misled or confused by the submission of "unavoidable accident" issue. There is, and no contention has been advanced to the contrary, no evidence of any fact that raised the issue of unavoidable accident. The Petitioner has been denied a fair trial by a fair minded jury to which he was entitled under the Seventh Amendment of the Constitution of the United States. This Court should take jurisdiction because Petitioner has been deprived of his substantive rights created under the Federal law by State law, practice and procedure, and the questions raised are important to litigants under the FELA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THE STATE OF TEXAS)
)
COUNTY OF HARRIS)

I, Mabel Grey Howell, one of the attorneys of record for the Petitioner E. F. Hammons, depose and say that on the 20th day of September, 1965, I served duplicate copies of the foregoing Petitioner's Supplemental Brief and Reply to Opposition to Petition for Certiorari in the Supreme Court of the United States on Messrs. Baker, Botts, Shepherd & Coates and Richard Miller, Esq. and R. Gordon Gooch, Esq., at their present address, 1600 Esperson Building, Houston, Texas, by depositing same in a United States Post Office in the City of Houston, Texas, with first class postage prepaid. This affidavit is made by an attorney who is not a member of the bar of the Supreme Court of the United States, pursuant to Rule 33-1. and 3. (c), Supreme Court Rules, as amended, 28 U.S. Code, Rules of the Supreme Court.

MABEL GREY HOWELL

SUBSCRIBED AND SWORN TO before the undersigned authority, this 20th day of September, 1965.

/s/ Irie L. Morgan
Notary Public in and for
Harris County, Texas

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21427

EMMETT E. PAGE,

Appellant,

versus

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Texas.

(August 10, 1965.)

Before TUTTLE, Chief Judge, and BROWN and GEWIN, Circuit Judges.

BROWN, Circuit Judge: Here again for the second time after a second trial, this case is not yet over. Unfortunately, we must reverse and remand for still a third trial. We must do so not because the District Judge failed to follow our pronouncements, but rather because he did. Once again it is an appeal by the Employee from an adverse judgment entered on a general verdict in an FELA

case. The immediate problem is the collateral source rule and whether evidence of the receipt of a railroad pension is admissible as bearing on the likelihood that the elderly Employee would have retired even though no injury had occurred. Also raised are questions of jury instructions, including specifically whether there is a double standard of proximate causation, one as to the Employee's affirmative case and another as to the Railroad's defense of contributory negligence.

The facts of the occurrence are adequately set forth in our prior opinion. *Page v. St. Louis Southwestern Ry.*, 5 Cir., 1963, 312 F.2d 84. There was no significant change either in the theories of liability and defense or the factual evidence presented. We there reversed the judgment entered on a general verdict for the Railroad because of error in the jury instruction on proximate cause.

COLLATERAL SOURCE EVIDENCE

But we affirmed the exercise of the trial Judge's discretion in admitting evidence over the Employee's objection that from about "October 7, 1959, one year after the accident," the Employee "had been drawing the sum of $160 per month as a pension under the Railroad Retirement Act." 312 F.2d at 94. Based largely on our prior cases of *A. H. Bull Steamship Co. v. Ligon*, 5 Cir., 1960, 285 F.2d 936, 937, and *Simmons v. Union Terminal Co.*, 5 Cir., 1961, 290 F.2d 453, 455, we had this to say.

> "In the present case, the evidence was logically relevant, it was admitted on cross examination of the plaintiff after he had testified that he was

> not working because of disability resulting from the accident. The defendant claimed that the plaintiff was malingering. Under the circumstances of the present case, the district court did not abuse its discretion, or commit reversible error, in admitting the evidence of retirement and retirement benefits for the limited purposes clearly stated by the court." 312 F.2d at 94.

Believing perhaps that hope does spring eternal in the human breast—and certainly should in that of the relentless advocate—counsel for the Employee undaunted by this categorical, adverse declaration was persistent. Once again, by motion in limine, he objected to the introduction of this evidence. Not unnaturally, the District Judge adhered, confident in the view that what was once approved would again be favored. And so it would, but. The change came not from alteration of our views. Rather, the change came in double strength from the two intervening decisions of the Supreme Court in *Tipton v. Socony Mobil Oil Co.*, 5 Cir., 1963, 315 F.2d 660, 1963 AMC ...., reversed, 1963, 375 U.S. 34, 84 S.Ct. 1, 11 L.Ed.2d 4; and *Eichel v. New York Cent.*, 1963, 375 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307.

The Railroad's argument to overcome the impact of these cases runs on a double track. First, it urges, this case being the identical one formerly tried, appealed and decided, sets in train our en banc decision of *Lincoln National Life Ins. Co. v. Roosth*, 5 Cir., 1962, 306 F.2d 110, on the law of the case. The second is that both *Eichel* and *Tipton* are distinguishable and in any event, the Supreme

Court did not intend thereby to rule out operation of the harmless error principle embodied in F.R.Civ.P. 61. As to the law of the case, *Roosth* took full cognizance of the principle that where the point is properly preserved for review, a different result is compelled where, subsequent to the first decision, there is an intervening change in the law by authoritative declaration of the authoritative court. *Lumbermen's Mutual Cas. Co. v. Wright*, 5 Cir., 1963, 322 F.2d 750, 763; *Pacific American Fisheries v. Hoof*, 9 Cir., 1923, 291 Fed. 306, cert. denied, 263 U.S. 712, 44 S.Ct. 38, 68 L.Ed. 420; *Messinger v. Anderson*, 1912, 225 U.S. 436, 32 S.Ct. 739, 56 L.Ed. 1152.

As to the second, we think there is no substantial basis for distinguishing this case from *Eichel* and *Tipton*. One distinction suggested is the absence of any limiting instructions in the Court's charge to the jury in *Tipton* in contrast to the very specific restrictions given by the District Judge here on the first trial and repeated in substantially the same terms the second time. (See 312 F.2d 84, 94) Although *Tipton* contained no limiting instruction, the very action in *Eichel* necessarily rejects the idea that limiting instruction will suffice. *Caughman v. The Washington Terminal Co.*, D.C.Cir., 1965, 345 F.2d 434.

Both *Tipton* and *Eichel* reflect a strong policy against the use of such collateral source evidence in FELA and analogous Jones Act-maritime law seamen's cases.[1] With the whole result in our case being the enigma wrapped

[1] See Judge Browning's extensive opinion for the 9th Circuit in Gypsum Carrier, Inc. v. Handelsman, 9 Cir., 1962, 307 F.2d 525, 534-35; see also The Collateral Source Rule in the American Law of Damages, 46 Minn. L.Rev. 664 (1962).

in the mystery of a general verdict concealing forevermore the use or uses to which the jury might have put this evidence, we cannot say that the error, preserved by emphatic and timely objection, was harmless. The case must, therefore, go back for a third, and we hope last, trial.

PROXIMATE CAUSE AND CONTRIBUTORY NEGLIGENCE

Of the objections to the charge, the most serious is that directed toward the charge on causation as to the Employee's contributory negligence. Following faithfully our former deliverance and the imprimatur we therefore placed on Judge Mathis' form,[2] the trial Judge structured his charge so that one instruction on causation would suffice both on attack and defense. This charge was in the *Rogers* theme of negligent acts playing any part, no matter how slight, in bringing about the injury.[3]

Of course, this is what the Employee wanted, but did not get on the first trial, and actually got because of our decision. So as between the injured worker and the Railroad, he thinks this is a fine and fair charge. But not so, he says, when it comes to judging causation as to asserted contributory negligence of the Employee. Here he wants the good old fashioned dialectic of proximate causation with all of its built-in metaphysical concepts of natural

[2] See note 5, 312 F.2d 84, 91, quoting from Judge Mathis' jury instructions, 28 FRD 497.

[3] The Judge charged: "As the term 'proximate cause' as used in this charge, I instruct you that an injury is proximately caused by an act or omission when it appears the act or omission played any part, no matter how small, in actually bringing about or causing the injury."

and unbroken sequence, but for, foreseeability of harm and the like.[4]

His reasoning is fascinating and beguiling. Whether it is more, is the question. It goes somewhat like this. As between injured worker and the railroad, the old traditional notions of proximate cause introduced a sometimes difficult, at times insurmountable, hurdle. See, e.g., *Coray v. Southern Pacific Co.*, 1949, 335 U.S. 520, 69 S.Ct. 275, 93 L.Ed. 208.[5] This led the Supreme Court by an evolutionary process briefly reviewed in our prior opinion to depart from this. It adopted the simple rule of physical causation as given here, note 3, *supra*. This is obviously more favorable to an injured worker, makes his judicial task easier, and as such effectuates the congressional policy behind FELA. But, the argument continues, there is no congressional policy to make the lot of the Railroad defendant an easier one or to remove any of the recognized difficulties to the successful assertion of the plea of contributory negligence. On the contrary, outlawing contributory negligence as a bar[6] and substituting in its place the statutory doctrine of "comparative negli-

[4] The Employee's objection to the charge (note 3, supra) spelled out what he thought the charge should have been, "Proximate cause * * * is that cause which, in a natural and continuous sequence, unbroken by any new and independent cause, ought to be anticipated by a person of ordinary prudence in the light of the attending circumstances."

[5] Discussed at length by us as the first point of departure, 312 F.2d 84, 88.

[6] "In all actions * * * against any such * * * railroad under * * * this chapter to recover damages for personal injuries to an employee * * *, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee * * *." 45 USCA §53.

gence"[7] Congress must have meant to retain, not diminish, existing problems of defense on this score. The argument now reaches its climax. Since traditional proximate cause was considered to be more onerous as a standard for affirmative recovery, it is bound to be more onerous as to a railroad attempting to sustain its burden of proving employee contributory negligence. Furthermore, since no possible whisper of a trace of a congressional desire to make defense easier can be found, causation as to contributory negligence should be stated in the rigmarole of proximate cause.

Attesting again to the marvels of an advocative system which, grinding out the thousands of FELA cases in State and Federal appellate courts, nevertheless after a half century's experience under the Act still leaves new questions, this problem is very, very fresh, the materials of decision are scarce, and the score now stands 1 to 1. Texas upholds the Employee's contention,[8] the Sixth Circuit, that asserted here by the Railroad.[9]

Many good legalistic arguments can be marshaled for either view, none however demonstrating with any assurance that at this late date we can, to paraphrase Judge Friendly,[10] discern what Congress in 1908 thought about

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[7] Prosser thinks it more accurate to say "comparative damages". Prosser, Torts §53 n.37.

[8] Missouri-Kansas-Texas R. v. Shelton, Tex.Civ.App., writ ref'd n.r.e., 1964, 383 S.W.2d 842.

[9] Ganotis v. The New York Cent. R., 6 Cir., 1965, 342 F.2d 767. Apparently counsel for the vanquished did not think the case "certworthy", *Tipton* (Harlan, J., dissenting), ...U.S....., ... 11 L.Ed.2d 4, 7. At least it was not sought.

[10] "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the

a matter on which it never thought. But even though we cannot cast it in terms of congressional purpose as a proposition of original intent, we still have the task of construing the Act and fashioning a rule to be followed. In this approach, we think the better rule is one of a single standard.

As to both attack or defense, there are two common elements, (1) negligence, i.e., the standard of care, and (2) causation, i.e., the relation of the negligence to the injury. So far as negligence is concerned, that standard is the same—ordinary prudence—for both Employee and Railroad alike. Unless a contrary result is imperative, it is, at best, unfortunate if two standards of causation are used. We think there are several reasons why substantively there is no such imperative.

At the outset, there is the doubt that such casuistries have any practical significance as the jury, undergoing its once-in-a-lifetime exposure to the equivalent of a law school lecture, seeks to translate instruction into definitive answers, either general verdict or special interrogatories. It was on this approach that we thought we could reconcile what appeared on the surface to be conflicting decisions of the Second and Ninth Circuits.[11] The Ninth Circuit's view seems to be that *Rogers* is a test, not of

California courts would think on an issue about which neither has thought." Nolan v. Transocean Air Lines, 2 Cir., 1960, 276 F.2d 280, 281, rev'd 365 U.S. 293, 81 S.Ct. 555, 5 L.Ed.2d 571, on remand 290 F.2d 904.

[11] DeLima v. Trinidad Corp., 2 Cir., 1962, 302 F.2d 585, 587-88; and Bertrand v. Southern Pac. Co., 9 Cir., 1960, 282 F.2d 569, 573, discussed by us in our former opinion, 312 F.2d 84, 91.

causation for the fact-finder, but of what makes a case requiring jury submission. See 312 F.2d 84, 91.

The Employee urges that a single standard would defeat another congressional purpose. In addition to the recognized aim of shifting the economic burden of railroad casualties from the injured worker to the negligent railroad, the Employee argues that Congress through the sanction of damages intended to elevate the operational standard of care by a railroad. Allowing it to shift more easily a considerable part of this economic loss back onto the shoulders of the injured worker would, he insists, tend to make the Railroad less diligent in its operating practices. Regardless of the doubts about this theoretical sanction, it is difficult to see how safety is enhanced if the standard of performance by the injured worker is lowered. Injuries generally come about from a failure of people. In our complex industrial society, carelessness of one may cause not only injury to self, but to others. Hence, while we doubt this figures much one way or the other as railroaders go about their daily chores or management lays out its program of maintenance and upkeep, a single standard is entirely consistent with the congressional hope of improved safety.

From a substantive point of view, we think that from the very nature of comparative negligence, the standard of causation should be single. Congress accorded valuable rights to injured employees in outlawing contributory negligence as a bar. It simultaneously subjected railroad to a more onerous burden. This was a legislative compromise to achieve recognized ends. But there is no in-

dication that in making employee negligence a partial factor, there was ever a purpose to retain all of the common law traditional refinements of a doctrine then being rejected.

Indeed, the language of §51 which is at the bottom of the *Rogers* test imposing liability for injuries or death "resulting in *whole* or in *part* from the negligence of" the railroad or its agents fits nearly into the structure of §53 which bans contributory negligence as a bar. Thus the purpose is to accord damages where the injuries are caused wholly from the negligence of the railroad or where caused partly by its negligence and partly by acts of others. The others would, of course, include the injured worker too. The object was to free this new legislatively created right of the common law defenses and refinements and to supply in its stead a simplified structure in which damages would be borne by railroad and injured worker in proportion to their respective faults. Use of the terms "in proportion to" and "negligence attributable to" the injured worker inescapably calls for a comparison. Since it is clear that §53 never contemplates a reduction in damages for negligent acts of the injured worker except to the extent such negligence brings about the injuries, it is obvious that for a system of comparative fault to work, the basis of comparison has to be the same.

This, it seems to us, becomes perfectly evident when this matter is approached freed of the artificial terminology of "proximate cause." Although we there approved (312 F.2d 84, 91, note 5) the use of the instruction

given (note 3, *supra*) and we observed also that the "case does not call for any wholesale condemnation of the use of language of proximate causation" in FELA litigation, the fact remains that on the *Rogers* thesis which we follow, there is really no place for "proximate cause" as such. True, there must be a casual relation either to impose damages against the Railroad or to require diminution for negligence of the injured worker. But it only adds to the problem to recast this simplified formula in the awkward, but outmoded, dialectic.[12]

UNAVOIDABLE ACCIDENT INSTRUCTION

Following again faithfully our admonition that "ordinarily in [an FELA] case * * * a charge on unavoidable accident is confusing and tends to distract the jury's at-

[12] As we have many times and recently said, see, e.g., E. L. Cheeney Co. v. Gates, 5 Cir., 1965, ...F.2d...., ... [No. 21768, June 10, 1965, pp. 1-2], a general charge with special interrogatories under F.R.Civ.P. 49(a) washes out a lot of problems and might well have solved most of them here. Using this device, the questions for jury answer simply phrased, would substantially be:

1. Was the Railroad negligent in one or more of the following respects:
   (a)
   (b)
   (c)
   (d) ?

2. If so, did one or more or all of such acts play any part, no matter how small, in actually bringing about or causing the Employee's injuries?

3. Was the Employee negligent in one or more or all of the following respects?
   (f)
   (g)
   (h)
   (j)

4. If so, (a) did one or more or all of such acts play any part, no matter how small, in actually bringing about or causing the Employee's injuries? and (b) if so, to what extent, stated in terms of percentage?

tention from the simple issues," 312 F.2d 84, 93, the Trial Judge declined, over objection of the Railroad to submit a definitive issue on unavoidable accident. We fully approve. Experience demonstrates that in a charge properly structured, there is no need for it and hence no place for one.

But again the Employee is something less than satisfied. This time it objects to the general instruction, the effect of which was merely to state the well recognized legal principle that the happening of the accident does not itself alone give rise to an inference of negligence.

We see no error in this instruction. Absent a res ipsa loquitur situation or one akin to it, the occurrence is not enough, and this charge merely highlighted the law's requirement that some negligence causing in some degree the resulting injuries was required.

INSTRUCTION ON SOLE PROXIMATE CAUSE

On the former trial, the Court charged in effect that if the jury concluded that the Railroad had "established * * * that the [Employee] was guilty of negligence," then the "burden is on the [Employee] * * * to * * * establish * * * that such negligence * * * on the part of the [Employee] was not the sole proximate cause of the accident * * *." 312 F.2d 84, 92.

On the second trial, the Judge took to heart our conclusion "that if such an instruction * * * was not positively erroneous, it was at the very least prejudicially mis-

leading." 312 F.2d 84, 93. And consequently he gave precise instructions putting the burden of proof on the Railroad to establish sole proximate cause.

The Court also gave the boiler plate instruction on sole proximate cause.[13] And since it was structured as a charge for a general verdict, the instructions took the inescapably awkward form which went like this: If you (a) find the Railroad guilty of negligence which (b) "proximately caused" the injuries, you will (c) return a verdict for the Employee, and (d) specify the sum of damages unless (e) you find the Employee guilty of negligence which "proximately" contributed to "cause" his injuries in which event (f) damages will be reduced by the percentage of negligence, except that if you (g) find that negligence of the Employee was the sole proximate cause, you will (h) return a verdict for the Railroad. In taking into account the various contingencies, the charge had to repeat such things as failure to find sole proximate cause, or finding Employee negligence which was some cause but not sole cause, etc.

Although we have much doubt that a proper exception was taken, F.R.Civ.P. 51, the Employee asserts on brief that the Court having given the *Rogers* physical causation rule (note 3, *supra*), the further instructions of the Court defining sole proximate cause produced confusion and

[13] "I instruct you that there may be more than one proximate cause of a given event or occurrence. But, as the term itself denotes, there can be only one sole proximate cause of a given event or occurrence; because, as the word 'sole' would indicate, in order for an act or omission of negligence to constitute a sole proximate cause of a given event or occurrence, it must be the sole and only cause of such event or occurrence."

contradiction. Thus the brief[14] points out the instruction on "sole proximate cause" necessarily incorporated the general charge on "proximate cause" (note 3, *supra*). Under that *Rogers* approach, "a cause, no matter how minute a percentage of the total causes, can be a proximate cause." This means that the Court is saying that some cause, no matter how small a fractional percentage of the total causes, can be the sole proximate cause." Going on, the brief asserts that, under the instruction given, the "jury could very easily have been misled into believing * * * that a negligent act of [the Employee] although playing only a minor part in bringing about his injuries, could also constitute the sole proximate cause of his injuries * * *."

Since our prior opinion, criticizing the placing of the burden of proof, contemplated that there might properly be a sole proximate cause submission and we are unable to read into the Employee's exceptions to the charge an adequate objection to it on this score, we would certainly not reverse the case on this ground. But since the case is being reversed on the evidence point, we deem it a matter of good judicial administration to point out now, as we did formerly on unavoidable accident, that ordinarily in FELA cases there is really no place for this issue in the jury submission as such. All of these collateral devices so dear to the heart of Texas bred and Texas trained lawyers immersed in its complex system of special issues submission are in reality merely a submission in another form of questions already implicit in the basic ones of the (a) Railroad's negligence, (b) causation by reason of the

[14] See Employee's brief p. 27-28.

Railroad's negligence, (c) the injured worker's negligence, (d) causation by reason of the worker's negligence, and (e) the percentage reduction of damages.[15] This effort

[15] Thus, using language familiar to Texas practitioners and writers, in the objection to the Court's charge both as to failure to submit unavoidable accident and placing the sole proximate cause burden on the railroad, Railroad counsel asserted "that the issue of sole proximate cause is an inferential rebuttal issue, and the burden of proof should properly be placed upon the plaintiff to establish that * * * any negligence on the part of the plaintiff was not the sole proximate cause of his injury * * *." Professor Hodges in Special Issue Submission in Texas (1959), regarded as one of the best guides through this labyrinth, discusses this in Chapter III "Inferential-Rebuttal Issues." He explains the rule at least for Texas in these terms. "A party is entitled to submission of issues relating to facts which, if established, would disprove the existence of some essential elements of the opponent's cause of action or affirmative defense * * * that is, in addition to submission of issues on the factual elements of plaintiff's cause of action and defendant's grounds of defense * * *, the charge must include issues relating to facts which would establish the non-existence of some element of either. * * * They are * * * generally termed, inferential rebuttals, rather than direct negatives. This is because they disprove by establishing the truth of a positive factual theory which is inconsistent with the existence of some factual element of the ground of recovery or defense relied upon by the opponent, and are therefore to be distinguished from a flat denial, a mere 'no'. * * * They are evidentiary issues also in the sense that a favorable answer on such an issue—an inferential rebuttal—cannot alone support a judgment; a negative answer to the opponent's direct issue submitting an element of his ground of recovery or defense is also necessary." Hodges, 40-41. He points out that "an issue which is the direct opposite or negative of another issue presenting some element of the cause of action or defense of the opposing party need not and should not be submitted." Hodges, 41. Their use may be a trap. "Since an inferential-rebuttal issue calls for the determination of a fact which, if established, disproves the existence of a fact relied upon as an element of a ground of recovery or defense, and is only relevant when some such other fact is submitted, the possibility of conflict in the answers of the jury is always presented." Hodges, 48. And, "if the answers to the inferential-rebuttal issue and issue which it rebutts are in conflict, judgment cannot properly be entered on either, since conflicting answers are mutually destructive." Hodges, 49. Application of the practice makes it necessary for the Court siring the whole business to put additional limitations

to cross examine the jury—whether special interrogatories are used or in outlining the successive fact findings as a predicate for a general verdict—leads only to confusion and a proliferation of metaphysical terms scarcely understandable to the most astute scholar. Thus, our efforts (312 F.2d 84, 92) to analogize sole proximate cause burden of proof to that of contributory negligence led us, in effect, to equate so-called *contributory* negligence of less than 100% to *contributory* negligence of 100%. That which is *all* is hardly *contributory*.

Of course the substantive law recognizes that if the negligence of the Employee is the sole cause of the injury or death, there is no liability.[16] This is sometimes spoken

or overtones on familiar concepts, much as was done here under the guise of defining "proximate cause" (see note 3, supra). See, e.g., Dallas R. & Terminal Co. v. Bailey, 1952, 151 Tex. 359, 250 S.W.2d 379, in which the Court undertook to prescribe the uses to which "unavoidable accident" or "new and independent cause" or "sole proximate cause" may be put. Hodges, 51. Even Texas might dispose of their use here. For "a sole proximate-cause issue may not be employed to inquire whether the conduct of the plaintiff was the sole proximate cause" and its use should be limited to ascertain whether "the conduct of some third person was the exclusive cause of the event." Hodges, 58. It is not clear, however, whether this reasoning is acceptable where, as under FELA, comparative negligence applies.

[16] See, e.g., New York Cent. R. v. Marcone, 1930, 281 U.S. 345, 50 S.Ct. 294, 74 L.Ed. 892; Chesapeake & Ohio R. v. Thomas, 4 Cir., 1952, 198 F.2d 783, cert. denied, 344 U.S. 921, 73 S.Ct. 387, 97 L.Ed. 709; Thompson v. Atlantic Coastline R., 1956, 94 Ga.App. 683, 96 S.E.2d 206, reversed on other grounds, 97 S.E.2d 135, opinion conformed 98 S.E.2d 102; but cf. Dennis v. Denver & Rio Grande Western R., 1963, 375 U.S. 208, 84 S.Ct. 291, 11 L.Ed.2d 256: "Once it is shown that 'employer negligence played any part, even the slightest, in producing the injury, Rogers v. Missouri Pacific RR Co., 352 U.S. 500, 506, 1 L.Ed.2d 493, 499, 77 S.Ct. 443, a jury verdict for the employee may not be upset on the basis of his own negligence, no matter how substantial it may have been, although the jury may, of course, take petitioner's contributory negligence into account, as it did here, in arriving at the final verdict." 11 L.Ed.2d 256, 258.

of as the employee's contributory negligence being the sole proximate cause, but this is both an inaccurate use of the term "contributory" and seems to be wholly unnecessary since a jury, honestly determining that the injured employee's actions were the sole cause of injury, necessarily finds (either on a general charge or by special interrogatories) that no act of the railroad, even though found to be negligent, played any part in bringing about the injury. We would repeat what Judge Rives stated for us the last time. We ought to avoid those practices which "distract the jury's attention from the simple issues of whether the carrier was negligent and whether that negligence was the cause, in whole or in part, of the plaintiff's injury." 312 F.2d 84, 93. All of the issues, affirmative and defensive, by way of attack and by way of defense can be simply inquired into in a simple way (see note 12, *supra*). When done in this fashion, with suitable accompanying general instruction which F.R.Civ.P. 49(a) calls for, there is no need any longer for putting this in the labored terms of "proximate cause" or "sole proximate cause" or "contributory negligence."

REVERSED AND REMANDED.

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IN THE

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OCTOBER TERM 1965

No. 313

E. F. HAMMONS,

Petitioner,

v.

TEXAS AND NEW ORLEANS RAILROAD COMPANY,

Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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A supplemental brief is necessary to correct representations made by petitioner in his reply brief. (The numbers below correspond with the supplemented paragraph in the Brief in Opposition.)

3. Petitioner claims that the Seventh Amendment affords no protection to respondent because the conclusion of law and finding of fact "are so intermingled," citing *New York Times Co.* v. *Sullivan*, 376 U.S. 254. However, the conclusion of law was simply that the respondent was not negligent; the finding of fact was the same. The Court charged the jury on the negligence issue requested by petitioner, and no complaint has been made, even now, to the Court's charge on this issue. Therefore, petitioner's effort to transform his appeal to the Supreme Court for an inconsistent fact finding should be apparent.

5. Petitioner claims that respondent "does not dispute the fact that there was no evidence" of an unavoidable accident. This is denied. Roadmaster Neely testified that certain weather conditions cause rails to break. This was confirmed by petitioner's own witness, E. A. Kyle. (S.F. 447) Furthermore, this particular rail lead had been closed from the mid 1940s until 1955, then had been thoroughly rehabilitated, and since then had been regularly inspected. See, e.g., S.F. 500-505, 526. [It is interesting to note that petitioner claimed that he rode over this lead while, in fact, it had been closed and spiked at the main line. See, e.g., S.F. 44] Therefore, there was ample evidence that the accident happened without anyone being negligent — which is exactly the charge of the Court on unavoidable accident.

Petitioner's position was expressly rejected by the Fifth Circuit in *Neal* v. *Lykes Brothers Steamship Company,* 306 F. 2d 313 (1962). See also *Quintero* v. *Sinclair Refining Co.,* 311 F. 2d 217 (C.A. 5, 1962). The unreported opinion of that Court in *Page* v. *St. Louis Southwestern R. Co.* merely approves the trial court's refusal to submit a special interrogatory in a particular case. It does not, as petitioner infers through skillful editing, ban the issue in all FELA cases. To the contrary, the Court expressly approves the charge that "the happening of an accident does not itself alone give rise to an inference of negligence." (Reply brief, p. 12).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should not be granted.

Respectfully submitted,

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TOM M. DAVIS

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RICHARD B. MILLER

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GORDON GOOCH

CERTIFICATE OF SERVICE

This is to certify that on the ..... day of September, 1965, a true and correct copy of this Supplemental Brief in Opposition was served on John P. Spiller, 4714 Fannin Street, Houston, Texas 77004 by placing same in the United States mails, properly addressed, postage prepaid, certified mail.

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TOM M. DAVIS